SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 793

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ELLIOTT W. MICHENER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	a	--
Caption [omitted in printing]	a	1
Record from D. C. U. S., Minnesota	1	1
Indictment	1	1
Arraignment, plea, judgment, and sentence	3	2
Motion to vacate judgment and sentence	4	3
Brief in support of motion to vacate	7	5
Notice of motion and motion to dismiss motion to vacate	10	8
Order denying and dismissing motion to vacate judgment and sentence	12	10
Notice of appeal	13	11
Praecipe for record	15	12
Assignment of errors	16	12
Appellee's designation of additional portions of record	18	13
Order extending time for filing and docketing transcript	19	14
Clerk's certificate [omitted in printing]	20	14
Order granting leave to proceed in forma pauperis and to be heard on typewritten record and brief	21	15
Appearance for appellee	22	15
Order of submission	23	16
Opinion, Gardner, J	24	16
Judgment	35	23
Motion to stay mandate	36	24
Order staying issuance of mandate	37	24
Clerk's certificate [omitted in printing]	38	24
Order extending time to file petition for certiorari	39	25
Order allowing certiorari	--	26

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	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	a	
Caption [omitted in printing]	a	
Record from D. C. U. S., Minnesota	1	
Indictment	1	
Arraignment, plea, judgment and sentence	3	
Motion to vacate judgment and sentence	4	
Brief in support of motion to vacate	7	
Notice of motion and motion to dismiss motion to vacate	10	
Order denying and dismissing motion to vacate judgment and sentence	12	
Notice of appeal	13	
Praecipe for record	15	
Assignment of errors	16	
Appellee's designation of additional portions of record	18	
Order extending time for filing and docketing transcript	19	
Clerk's certificate [omitted in printing]	20	
Order granting leave to proceed in forma pauperis and to be heard on typewritten record and brief	21	
Appearance for appellee	22	
Order of submission	23	
Opinion, Gardner, J	24	
Judgment	35	
Motion to stay mandate	36	
Order staying issuance of mandate	37	
Clerk's certificate [omitted in printing]	38	
Order extending time to file petition for certiorari	39	

[Caption omitted.]

1 In District Court of the United States for the District of Minnesota, Third Division

Indictment

Filed September 19, 1935

At a stated term of the District Court of the United States of America for the District of Minnesota held at the City of Saint Paul, within and for the District and Division aforesaid, on the first Tuesday in April, being the second day of April, in the year of our Lord one thousand nine hundred and thirty-five, by a duly empaneled, charged and sworn Grand Jury of the United States of America within and for said District, it is presented in manner and form following, that is to say

UNITED STATES OF AMERICA,
DISTRICT OF MINNESOTA, FIFTH DIVISION, *set.:*

The Grand Jurors of the United States of America within and for said District in the name and by the authority of the said United States of America, upon their oaths present that heretofore, to wit, on or about August 25, 1934, at Number 316½ West First Street, in the City of Duluth, in the County of St. Louis, in the state and district of Minnesota, and within the jurisdiction of this Court, one Richard C. Franzeen and one Elliott W. Michener, then and there being, unlawfully did cause and procure to be made a certain plate in the likeness of a plate designated and prepared by the direction of the Secretary of the Treasury of the United States, for the printing in the Bureau of Printing and Engraving of the United States, of that certain obligation of the United States, to wit, that certain ten-dollar Federal Reserve Note on the Federal Reserve Bank of Minneapolis, serial 106429062A, check letter "H," face plate No. 12, series of 1928 B, bearing the facsimile signatures of W. O. Wood, Treasurer of the United States, and A. W. Mellon, Secretary of the Treasury of the United States, a more particular description of said Federal Reserve Note being unknown to the Grand Jurors; which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that heretofore, to wit, on or about August 25, 1934, and thereafter, at the City of Duluth, in the County of St. Louis, in the state and district of Minnesota, and within the jurisdiction of this Court, one Richard C. Franzeen and one Elliott Michener, then and there being, being the identical persons

2 named in the foregoing count of this indictment, being referred to hereinafter as "defendants," unlawfully did have in their control, custody, and possession that certain plate made after and in the similitude of a plate from which genuine Federal Reserve Notes of ten-dollar denomination have been printed in the Bureau of Printing and Engraving of the United States, with intent then and there on the part of defendants to use said plate in counterfeiting Federal Reserve Notes on the Federal Reserve Bank of Minneapolis, of the denomination of ten dollars, bearing serial number 106429062A, check letter "H," face plate No. 12, series of 1928 B, and bearing the facsimile signatures of W. O. Wood, Treasurer of the United States, and A. W. Mellon, Secretary of the Treasury of the United States, a more particular description of said Federal Reserve notes being unknown to the Grand Jurors, and defendants then and there well knowing said plate to be made after and in the similitude of a plate from which genuine Federal Reserve Notes of ten-dollar denomination have been printed, as aforesaid, and defendants then and there well knowing said plate was intended for use in counterfeiting Federal Reserve Notes, as aforesaid; which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

GEORGE F. SULLIVAN,
United States Attorney.

[Endorsed: Indictment. Sec. 150 C. C. (18 U. S. C. 264). 2 counts.]

A true bill.

D. C. SHEPARD,
Foreman of the Grand Jury.

[File endorsement omitted.]

3 In the District Court of the United States

Arraignment, plea, judgment and sentence

May 12, 1936

Court opened pursuant to adjournment.

Present: Honorable ROBERT C. BELL, Judge.

No. 5349

THE UNITED STATES vs. RICHARD C. FRANZEEN and ELLIOTT MICHENER

The United States Attorney being present, defendants appear, are arraigned, and each defendant enters a plea of guilty to the indictment herein against him.

* * * * *

No. 5349

THE UNITED STATES *vs.* ELLIOTT MICHENER ET AL.

The defendant having heretofore pleaded guilty to the indictment herein against him, it is by the Court

Considered and adjudged: That said defendant, Elliott Michener, is guilty of the crime of unlawfully causing and procuring to be made a certain plate in the likeness of a plate of that certain obligation of the United States, to wit, that certain ten-dollar Federal Reserve Note on the Federal Reserve Bank of Minneapolis, serial 10642906 2A, check letter "H," face plate No. 12, series of 1928 B, as charged in the first count of said indictment, and unlawfully having in his control, custody, and possession that certain plate heretofore described in the first count, defendant well knowing said plate was intended for use in counterfeiting Federal Reserve Notes, as charged in the second count of the indictment; that as punishment therefor said defendant do pay a fine of $5,000 and be committed to the custody of the Attorney General or his authorized representative for confinement in an institution of the penitentiary type for the term of fifteen (15) years on the first count, and do pay a fine of $5,000 and be committed to said institution for the term of fifteen (15) years on the second count, and until he shall have paid said fines or been discharged from said institution by due course of law. Said terms of imprisonment shall be served consecutively, the term of imprisonment upon the second count to begin immediately upon the expiration of the term of imprisonment upon the first count. The term of imprisonment upon the first count shall begin immediately upon the expiration of the sentence defendant is now serving at the Wisconsin State Penitentiary, Waupun, Wisconsin.

4 In the District Court of the United States

[Title omitted.]

Motion to vacate judgment and sentence

Filed March 26, 1946

To the Honorable Robert C. Bell, Judge of the District Court of the United States for the District of Minnesota, Fifth Division:

Now comes Elliott W. Michener, defendant in the above entitled cause and move'nt herein, and respectfully represents:

I. That he is a citizen of the United States of legal age, and is at present confined in the United States Penitentiary at Alcatraz, California.

II. Statement of Facts and Law Involved.

That he was charged in an indictment containing two counts, filed in the district court for the aforesaid district, for violation of Section 264 of Title 18, U. S. C. A., 150 C. C.

The pertinent parts of these two counts read:

(1) "That (defendants) on or about August 25, 1934, * * * in the city of Duluth * * * did unlawfully cause and procure to be made a certain plate in the likeness of a plate designated * * * for the printing of a * * * certain ten-dollar Federal Reserve Note * * *."

(2) "That (defendants) on or about August 25, 1934, and thereafter, at the city of Duluth, * * * unlawfully did have in their control, custody and possession that certain plate (same plate) * * * with intent then and there on the part of defendants to use said plate in counterfeiting Federal Reserve Notes * * *."

The statute these counts are predicated on reads, in pertinent part:

(Section 264) (1) "* * * or whoever by any way, act, or means shall make or execute, or cause or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; * * *."

5 (2) "* * * or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; * * *."

Upon arraignment the defendant pleaded guilty, and the following sentence was imposed: Fifteen years imprisonment and a fine of $5,000 on Count One, and a like fifteen years imprisonment and $5,000 fine on Count Two; such sentences to be served consecutively.

It is under the first of these sentences that the defendant, and movent herein, is now being restrained.

GROUNDS FOR MOTION, AND JURISDICTION THEREOF

Movent now applies for the vacation of judgment and sentence on Count Two, for the reason that arraignment upon that Count was in violation of the former jeopardy clause as set forth in the Fifth Amendment to the Constitution of the United States, and that said judgment and sentence are thereby void.

Jurisdiction in this motion is conferred on this Honorable Court under the provisions of Section 377 of Title 28, U. S. C. (Holiday v. Johnson, 313 U. S. 342).

PRAYER

Wherefore, movent respectfully prays that this Honorable Court grant this motion.

Dated this 25th day of March 1946.

Respectfully submitted.

ELLIOTT W. MICHENER,
Movent, In propria persona.

[*Duly sworn to by Elliott W. Michener; jurat omitted in printing.*]

PROOF OF SERVICE

The above-named defendant-movement has placed in the
6 United States mails a copy of the foregoing motion, addressed to the United States Attorney for the above-stated district.

Subscribed and sworn to before me this 26th day of March 1946.

[SEAL] H. W. WENIHFEL, (?)
Acting Associate Warden
United States Penitentiary,
Alcatraz, California.

Warden-Associate Warden Authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Elliott W. Michener is a citizen of the United States.

[File endorsement omitted.]

7 In the District Court of the United States

[Title Omitted.]

Brief in support of motion to vacate void judgment and sentence

Filed March 26, 1946

STATEMENT OF CASE.

The indictment upon which the defendant was arraigned and sentenced on May 12, 1936, in the above named court, contains two counts charging violation, at the same time and place, of two provisions of Section 264, Title 18, U. S. C. A., 150 C. C.

The first count charged a violation of that provision which reads:

"* * * whoever by any way, act, or means shall make or execute, or cause or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designed for the printing of such obligation; * * * shall be fined, etc."

(It should here be noted that "to make" and "to cause and procure to be made" are one and the same offense. See Section 332, Criminal Code (Comp. St. Par. 10506).)

The second count charges a violation of that provision which reads:

"* * * whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in counterfeiting any such obligation, or any part thereof; * * * shall be fined, etc."

The movant submits that the same evidence which proves a violation of the first provision (against manufacture) is in itself sufficient to prove a violation of the second provision (against (1) possession of a plate with (2) the intent that it be used or suffered to be used in printing counterfeit notes).

This is true because:

(1) *Manufacture proves possession.*

Tritice v. U. S., 4 F (2d) 644 (C. C. A. 5).

Patrilo v. U. S., 7 F. (2d) 805 (C. C. A. 8).

8 And (2) Unlawful manufacture shows unlawful possession; and unlawful possession of counterfeiting implements is held prima facie evidence of an intent to use such implements for counterfeiting.

In Baender v. U. S., 260 Fed. 832, 40 S. Ct. 396, 252 U. S. 586, it is ruled:

"An indictment charging the defendant with a violation of this section (283) in having in his possession certain dies for making counterfeit money, need not allege that he had possession of the dies with the intent to defraud or to use the same in making counterfeit money. A criminal intent is to be inferred from the unlawful possession, and need not be averred."

It should be pointed out here that unlawful manufacture, by showing the source of the plate and by establishing guilty knowledge with certainty precludes use of the one reasonable defense available to a defendant charged with unlawful possession alone.

For where the possesser might possibly be able to plead an ignorant or innocent holding of the plate for someone else, the manufacturer and possessor will be able to offer no credible defense at all.

From this it follows that a presumption legally sufficient to establish criminal intent on the basis of unlawful possession alone, must, on being applied to manufacture and possession, become practically conclusive. And in all but theory it is conclusive. For it is based upon the practical logic, obvious to any juror, that a plate unlawfully made can serve no lawful function, and that it has only a single unlawful one, i. e., the printing of counterfeit notes.

This point is recognized in Kaye v. U. S., 147, 177 F. (C. C. A. 7): "The making of counterfeit implements is inherently wrong. * * * The intent to use such molds fraudulently or unlawfully should be assigned to the intent to use them for the making of counterfeit coins."

The movant's original proposition has therefore been fully established. It has been shown that evidence of manufacture is (1) sufficient to prove possession, and (2) constitutes the best possible prima facie proof of the required criminal intent.

It is the duty of the court, therefore, to recognize that the movant has been twice tried and punished for the same offense. For the indictment in his case charged possession as occurring at the time and place of manufacture, and since possession is a continuous offense which may not be made multiple by arbitrary division, it is contained within the crime of manufacture and is an "included offense," for which a separate consecutive sentence cannot stand.

Reynolds v. U. S., 280 F. 1 (C. C. A. 6).
Morgan v. U. S., 294 F 82 (C. C. A. 4).
Hewitt v. U. S., 110 F. (2d) 1 (C. C. A. 8).

NOTE ON DOUBLE JEOPARDY TESTS

In Grafton v. U. S., 27 S. Ct. Rep., 755, the Supreme Court declined "to attempt to formulate any rule by which every conceivable case must be solved." In this respect it should be held in mind that when one offense is included within another (as assault, with assault and battery) the two offenses are not, and cannot be, identical, for the part cannot equal the whole; and that therefore a rule which is designed to test the identity of offenses may not always easily discover whether or not the one offense is included within the other.

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9 (For examples, see U. S. v. Harris, D. C. 26 F. Supp. 788; also, the criticism of it in Hewitt v. U. S., 110 F. (2d) 1 (C. C. A. 8).

Tests of former jeopardy have been collected in 1 N. Cr. L., Section 1048, by Bishop. "Offenses are the same," he concludes, "whenever evidence adequate to sustain one indictment will equally sustain the other. Moreover, if the two indictments set out like offenses and relate to one transaction, yet if one contains more of a criminal charge than the other, but upon it there could have been a conviction for what was embraced in the other, the offenses, though of different names, are, within our constitutional guaranty, the same."

CONCLUSION

The movant submits that a fair and reasonable interpretation of the Fifth Amendment's prohibition against the individual being twice tried and punished for the same offense necessitates a single sentence in his case, and that the sentence on Count Two for possession be vacated, or so modified as to run concurrently with the sentence on Count One.

Respectfully submitted.

ELLIOTT W. MICHENER.

[File endorsement omitted.]

10 In the United States District Court

[Title omitted.]

Notice of motion and motion of United States of America to dismiss defendant's motion to vacate judgment and sentence as to him

Filed April 12, 1946

To ELLIOTT W. MICHENER, Defendant:

You will please take notice, that the undersigned attorneys for the plaintiff will make a motion before the Honorable Robert C. Bell, one of the Judges of the above-named Court, on the 22nd day of April 1946, at 10:00 A. M. of that day, or as soon thereafter as counsel can be heard, in his Courtroom in the Federal Courts Building at St. Paul, Minnesota, for an Order to dismiss your motion to vacate the judgment and sentence imposed on the second count of the Indictment, as to you, which said motion was dated March 25, 1946, and filed herein on March 26, 1946, at Duluth, Minnesota, on the ground that your motion fails to set forth any facts that would entitle you to the relief asked for in your motion, and on the further ground that the sentence imposed and the

judgment entered herein against you on the second count of said indictment was and is a lawful and subsisting judgment.

The plaintiff's motion to so dismiss will be based upon the files and records herein and upon your said motion.

Dated, this 11th day of April 1946.

Victor E. Anderson,
VICTOR E. ANDERSON,
United States Attorney,

James J. Giblin,
JAMES J. GIBLIN,
Assistant United States Attorney,

Attorneys for Plaintiff,
221 Federal Courts Building,
St. Paul 2, Minnesota.

[File endorsement omitted.]

11 JJG:hjn.
10-5924B.

APRIL 11, 1946.

Re: United States v. Elliott W. Michener, No. 5349 Cr.—Fifth Division

MR. ELLIOTT W. MICHENER,
United States Penitentiary,
Alcatraz Island, California.

DEAR SIR: I enclose a copy of our Notice of Motion and Motion to Dismiss your Motion, dated March 25, 1946, to vacate the judgment and sentence imposed on the second count of the indictment.

You will notice that we are bringing the matter on for hearing before Honorable Robert C. Bell, United States District Judge, at St. Paul, Minnesota, on the 22nd day of this month, at 10:00 A. M.

We suppose that you desire to have the matter submitted on your brief, which was attached to your Motion.

Yours very truly,

VICTOR E. ANDERSON,
United States Attorney.

Enc.

12 In the United States District Court

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ELLIOTT W. MICHENER, DEFENDANT

Order denying and dismissing motion to vacate judgment and sentence

April 22, 1946

The affidavit of the above named defendant Elliott W. Michener dated March 25, 1946, to which was attached his Statement of Case, authorities and arguments were filed herein on the 25th day of March 1946; that he therein moved to vacate the judgment and sentence that had been entered and pronounced in Federal Court, Duluth, Minnesota, on May 12, 1936, on the second count of an indictment in two counts charging violations of Title 18, U. S. C. A. 264, relating to counterfeiting; that on the 11th day of April 1946, the United States Attorney for the District of Minnesota, responded by Notice of Motion and Motion to Dismiss the Defendant's Motion and the same was filed herein on April 11, 1946, and a copy thereof on that date duly mailed to the said defendant Elliott W. Michener and addressed to him at the United States Penitentiary at Alcatraz Island, California.

And the matter having been duly brought on for hearing before the undersigned Judge at St. Paul, Minnesota, in Federal Court at St. Paul, Minnesota, on this 22nd day of April 1946, being a Special Term day, James J. Giblin, Assistant United States Attorney, appearing for the plaintiff, and there being no appearance for the defendant: and the Court having heard the statement of the United States Attorney in opposition to the defendant's Motion and having considered the defendant's Motion and his brief in support thereof which was attached to his Motion, and being fully advised in the premises,

It is ordered that the said motion of said Elliott W. Michener to vacate the sentence and judgment of this Court entered on May 12, 1936, herein with respect to the second count of the Indictment herein, be and the same is in all things denied and dismissed.

And the Clerk of the above named Court is directed to send a copy of this Order by mail forthwith to the said defendant addressed to him at the United States Penitentiary, Alcatraz Island, California.

Dated April 22, 1946.

Robert C. Bell,
ROBERT C. BELL,
United States District Judge.

[File endorsement omitted.]

13 In the District Court of the United States

[Title omitted.]

Notice of appeal

Filed April 29, 1946

Notice is hereby given that Elliott W. Michener, the defendant in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit, from the Order denying the defendant's Motion to Vacate Void Judgment and Sentence, as entered in this District Court on Apr. 22, 1946.

Elliott W. Michener,
ELLIOTT MICHENER.

Dated April 26, 1946.

GROUNDS FOR APPEAL

The defendant has been punished twice for the same offense, in that the offense set out in Count One of his indictment included every element of the offense set out in Count Two.

[File endorsement omitted.]

14 MAY 13, 1946.

Mr. E. E. KOCH,
Clerk, U. S. Circuit Court of Appeals,
St. Louis, Mo.

DEAR MR. KOCH: Adverting to my letter to you of the 11th instant on the subject of Elliott W. Michener, Alcatraz inmate, I would now advise you that Judge Bell has directed me to proceed in this matter, in accordance with the provisions of the new criminal Rule No. 37.

I, therefore, respectfully enclose herewith, pursuant to said rule, duplicate of Michener's Notice of Appeal, together with a statement of the docket entries in his case.

Yours very faithfully,

THOMAS H. HOWARD,
Clerk, U. S. District Court.

THH:MAP.
Encl.

15 In the District Court of the United States

[Title omitted.]

Praecipe for record

Filed May 3, 1946

To the Clerk of the above-named Court:

You are hereby requested to prepare and send to the Clerk of the U. S. Court of Appeals for the Eighth Circuit, at St. Louis, Mo., the following records, to wit:

1. Indictment and Judgment in Criminal Case No. 5349.
2. Motion to Vacate Judgment and Sentence, as filed March 26, 1946.
3. Order denying said Motion.
4. Notice of Appeal.
5. Assignment of Errors.

Said records to be prepared according to the rules prescribed for such cases.

Respectfully submitted.

Elliott W. Michener,
ELLIOTT W. MICHENER,
Alcatraz, California.

[File endorsement omitted.]

16 In the District Court of the United States

[Title omitted.]

Assignment of errors

Filed May 3, 1946

On March 26, 1946, the defendant in the above-entitled cause filed in this Court a Motion to Vacate Judgment and Sentence on the second count of his indictment. On April 22, 1946, an Order was entered by this Court, denying said Motion.

In entering this Order:

1. The United States District Court erred in failing to find that the offense set out in Count Two was included within the offense set out in Count One.
2. The United States District Court erred in failing to vacate judgment and sentence on Count Two.

Respectfully submitted.

Elliott W. Michener,
ELLIOTT W. MICHENER,
Appellant, Alcatraz, California.

[File endorsement omitted.]

17

Mr. James J. Giblin, May 13, 1946
Assistant U. S. Attorney,
Federal Courts Building, St. Paul, Minnesota.

Dear Mr. Giblin: Pursuant to Judge Bell's direction to me to proceed under new criminal Rule No. 37 on the appeal taken by Alcatras inmate, Elliott W. Michener, from this Court's Order denying his motion to vacate judgment and sentence entered on May 12, 1936, I now respectfully enclose herewith copy of Michener's Notice of Appeal, in accordance with the provisions of Rule No. 37.

There is also respectfully enclosed herewith copy of this appellant's so-called "praecipe for records," which I am interpreting as his "designation of contents of record on Appeal," called for by Civil Rule No. 75, which rule I understand governs the record on appeal even in a criminal proceeding (see new criminal Rule No. 39 (b) (1)). While Civil Rule No. 75 provides that the appellant shall serve this designation on the appellee, I am assuming that under the circumstances in this case you will probably consider my mailing to you the copy of this designation as constituting such service. If you are in accord with this suggestion, then I will delay further preparation of such record for ten days to permit of your filing with me a counter designation, which action on your part, under the circumstances in this case, could be regarded as service on the appellant.

You will understand, of course, that in the preparation of this record I shall also be governed by the direction to the Clerk contained in Civil Rule No. 75 (g).

Yours very faithfully,

Thomas H. Howard,
Clerk, United States District Court.

THH: MAP.
Encl.

18 In the United States District Court

[Title Omitted.]

Designation by appellee of additional portions of the record to be contained in the record on appeal

Filed May 16, 1946

To the Clerk of the above-named Court:

In addition to the records designated by the appellant to be contained in the record on appeal to the Eighth Circuit Court of Appeals, the appellee hereby designates the following:

(1) Notice of Motion, and Motion of the United States of America, dated April 11, 1946, to dismiss defendant's motion to vacate judgment and sentence as to him, Elliott W. Michener, together with a copy of letter attached thereto, dated April 11, 1946, addressed to Mr. Elliott W. Michener, United States Penitentiary, Alcatras, California, by Victor E. Anderson, United States Attorney.

(2) Appellant's praecipe for record filed May 3, 1946 (treated as designation of contents of record on appeal under Rule 75 (a), Rules of Civil Procedure, and Rule 39 (b), Rules of Criminal Procedure).

(3) Appellee's designation of additional portions of record.

Dated at St. Paul, Minnesota, May 16, 1946.

UNITED STATES OF AMERICA, *Appellee.*

By Jas. J. Giblin,

JAMES J. GIBLIN,

Asst. United States Attorney,

District of Minnesota.

[File endorsement omitted.]

19 In the District Court of the United States

[Title omitted.]

Order extending time for filing and docketing transcript

June 3, 1946

Ordered: That the time for filing and docketing the Transcript on Appeal from the Order denying motion to vacate judgment and sentence in the above case be, and it hereby is, extended to and including June 20, 1946.

ROBERT C. BELL,

United States District Judge.

Dated: June 3rd, 1946.

20 [Clerk's certificate to foregoing transcript omitted in printing.]

21 In United States Circuit Court of Appeals, Eighth Circuit

No. 13375—May Term, 1946

ELLIOTT W. MICHENER, APPELLANT

vs.

UNITED STATES OF AMERICA

Appeal From the District Court of the United States for the District of Minnesota

Order granting leave to appellant to proceed with appeal in forma pauperis and to be heard on typewritten record and brief

May 17, 1946

The Court having considered the motion and affidavit of appellant for leave to file transcript of record in forma pauperis and for leave to proceed on typewritten brief, and duplicate notice of appeal and certified statement of docket entries having been received from the Clerk of said District Court, It is now here Ordered that the appellant be, and he is hereby, granted leave to proceed with his appeal in this Court as a poor person, without prepayment of any fees or costs to the Clerk or other officers of this Court.

And it is further Ordered by this Court that the appeal herein be heard and determined upon the certified typewritten transcript of record from the District Court, and appellant is also granted leave to be heard upon typewritten brief, of which five clearly type copies should be filed with the Clerk of this Court, and one of these copies should be served upon counsel for the appellee.

22 In United States Circuit Court of Appeals

Appearance of counsel for appellee

Filed May 25, 1946

The Clerk will enter my appearance as Counsel for the Appellee.

VICTOR E. ANDERSON,
United States Attorney.
JAS. J. GIBLIN,
Asst. U. S. Attorney,
221 Fed. Courts Bldg., St. Paul, Minn.

[File endorsement omitted.]

23 In United States Circuit Court of Appeals

Order of submission

September 5, 1946

This cause having been called for hearing in its regular order and no counsel appearing for appellant the same was argued by Mr. James J. Giblin, Assistant United States Attorney, for appellee.

Thereupon, this cause was submitted to the Court on the typewritten transcript of record from said District Court, typewritten brief of appellant, printed brief of appellee and typewritten reply brief of appellant.

24 In United States Circuit Court of Appeals,
Eighth Circuit

No. 13375

ELLIOTT W. MICHENER, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Minnesota

Mr. Elliott W. Michener, Per Se, on brief for Appellant.

Mr. James J. Giblin, Assistant United States Attorney (Mr. Victor E. Anderson, United States Attorney, was with him on the brief), for Appellee.

Before GARDNER, WOODROUGH, and RIDDICK, Circuit Judges.

Opinion

October 23, 1946

GARDNER, Circuit Judge, delivered the opinion of the Court.

This is an appeal from an order denying appellant's motion to vacate the sentence imposed and the judgment entered on the second count of an indictment. The motion was based
25 upon the ground that the arraignment upon the second count of the indictment was in violation of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States. The indictment, drawn under Section 264, Title 18, U. S. C. A., was in two counts. Count 1 charged that

appellant and a co-defendant "unlawfully did cause and procure to be made a certain plate in the likeness of a plate designated and prepared by the direction of the Secretary of the Treasury of the United States, for the printing in the Bureau of Printing and Engraving of the United States, of that certain obligation of the United States; to-wit, * * *." Then followed a description of the plate. The second count charged that at the same time and place, appellant and his co-defendant "unlawfully did have in their control, custody and possession that certain plate made after and in the similitude of a plate from which genuine Federal Reserve Notes of ten-dollar denomination have been printed in the Bureau of Printing and Engraving of the United States, with intent then and there on the part of defendants to use said plate in counterfeiting Federal Reserve Notes on the Federal Reserve Bank of Minneapolis, * * *." Then followed a description of the obligation, being identical with the description set out in Count 1 of the indictment. From the facts disclosed by the indictment and those admitted with commendable frankness by the government's attorney on oral argument, it is clear that there was but one plate involved.

To this indictment appellant pleaded guilty and upon such plea he was sentenced to a term of fifteen years and a fine of $5,000.00 on each count, the sentences to be served consecutively.

On this appeal appellant urges that he has been twice placed in jeopardy for the same offense in that the same
26 evidence which proves Count 1 will sustain a conviction on Count 2.

The statute under which the indictment was drawn, omitting parts not here material, reads as follows:

"* * * whoever by any way, art, or means shall make or execute, or cause or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or whoever shall sell any such plate, stone, or other thing, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or whoever shall have in his control, custody, or possession any plate, stone or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other

security, or any part thereof, * * * shall be fined not more than $5,000, or imprisoned not more than fifteen years, or both." (Sec. 264, Title 18, U. S. C. A.)

It is argued by appellant that one can not make, cause or procure to be made a mechanism such as is described in Count 1, without having control, custody and possession of it, and that the offense of unlawful possession is complete at the moment of possession and that such possession is a continuing offense, not augmented because it may continue for more than a day, nor subject to arbitrary division into separate offenses or periods of time. We agree with appellant that he could not have made or procured to be made, the plate described in this indictment without having possession of the plate. Patrilo v. United States, 8 Cir., 7 F. 2d 805; Morgan v. United States, 4 Cir., 294 F. 82. If he procured it to be made, the person making it for him was his agent and he was in constructive possession when the plate was completed by his procurement. Richardson v. United States, 3 Cir., 181 F. 1; Moffitt v. United States, 10 Cir., 154 F. 2d 402; United States v. DeNormand, 2 Cir., 149 F. 2d 622. If he made it himself, he was of necessity in possession of the plate when it was completed.

27

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test usually applicable, and the one which appellant here invokes to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. Hewitt v. United States, 8 Cir., 110 F. 2d 1; Roark v. United States, 8 Cir., 17 F. 2d 570; Spencer v. Cox, 8 Cir., 140 F. 2d 73. The test of identity of offenses is whether the same evidence is required to sustain them. If it is not, then the mere fact that both charges relate to and grow out of one and the same transaction does not necessarily make a single offense where two are defined by the statute. There need not, however, be formal, technical, absolute identity, but substantial identity is sufficient. To sustain the plea of double jeopardy, it must appear that appellant upon the first charge could have been convicted of the offense in the second. The possession with which appellant is charged in the second count resulted from and was an incident to the act charged in the first count. In other words, he became possessed of this plate by the unlawful act of making it or procuring it to be made. There was but one transaction and one plate and the act of procuring possession was an integral part of the unlawful act of creating this plate.

28

There can be no doubt but that separate offenses might be charged and proved under this statute, but that does not solve the question here presented. We must interest ourselves not

with what might have been done, but what was actually done in this case. As said by Judge Faris, speaking for this court in Cain v. United States, 19 F. 2d 472.

"The trouble is not with the law but with the facts. This possibility of a violation of either statute by wholly different acts is readily demonstrable. Many of the cases seem to make the latter possibility the test which saves the situation from double jeopardy. We think, however, it is a question of what was actually done rather than a question of what might have been done. Defendant concededly might have made a sale of morphine through the mail, or he might have sent morphine through the mail, or shipped it by express or by freight, and thus have been guilty on the second count, without making a sale."

So in the instant case, it may be conceded that under a possible state of facts one could properly be convicted of the two offenses charged in the indictment, but as stated by Judge Faris in Cain v. United States, supra, "It is a question of what was actually done, rather than a question of what might have been done." This thought is expressed by Judge Rutledge, now Mr. Justice Rutledge, in a concurring opinion in District of Columbia v. Buckley, 128 F. 2d 17, where, in referring to the evidence type of test, he says,

"The test is useful to spell out the elements of the crimes charged, and therefore to disclose what, if any, difference exists between them. If there is none that ends the matter. But if difference is disclosed there is in my view always another step which must be and is taken either intuitively or with deliberation. That is to weigh the difference to determine whether it is substantial or too minor to be material for purposes of double jeopardy. The court must evaluate as well as spell out the difference, and
29 determine whether the element it affects is sufficiently important in relation to other elements involved in both crimes to justify refusal to apply the constitutional protection."

Substantially the same test is suggested by the Circuit Court of Appeals of the Seventh Circuit, in the case of Murphy v. United States, 285 F. 801, where in an opinion by Judge Evans it is said,

"The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine this issue. And it is needless to add that one accused of crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution."

Congress may create separate and distinct offenses growing out of the same transaction but where it is necessary in proving one offense, to prove every essential element of another growing out of the same act, a conviction of the former is a bar to a prosecution for the latter. The rule is well stated in Bishop, 1 N. Cr. L., Section 1048, as follows:

"Offenses are the same whenever evidence adequate to sustain one indictment will equally sustain the other. Moreover, if the two indictments set out like offenses and relate to one transaction, yet if one contains more of a criminal charge than the other, but upon it there could have been a conviction for what was embraced in the other, the offenses, though of different names, are, within our constitutional guaranty, the same."

In Patrilo v. United States, supra, Patrilo and others were convicted of possessing property intended for unlawful manufacture, distillation and production of intoxicating liquor and of unlawfully manufacturing intoxicating liquor. The court held that the charge of possession was included in the charge of manufacturing. In the course of the opinion it is said,

"But conceding that the proof would have supported a verdict of guilty on the first count as against all three defendants, because they were all in the joint possession of the still and mash, within the meaning of section 25, they could not also be convicted and punished on the second count, for the reason that the offense charged therein embodied the offense charged in the first count. The two charges are of the same date and the evidence deals with but one occasion, when the police officers went to Patrilo's place."

The court quotes with approval from Tritico v. United States, 5 Cir., 4 F. 2d 664, as follows:

"* * * it must be apparent at once that proof of possession of distillery apparatus would necessarily have to be included in order to prove the manufacture of liquor, because such manufacture would otherwise be impossible. Likewise the same evidence which proved manufacture of liquor proved possession of it, because, upon the manufacture being completed, the liquor necessarily came into the control or possession of the manufacturer. It can make no difference whether separate charges are tried together or at different times. If the defendants had been tried for manufacturing liquor, they could not afterwards have been prosecuted for possessing the apparatus necessary for such manufacture or for possessing the liquor so manufactured."

See, also: Reynolds v. United States, 6 Cir., 280 F. 1; Morgan v. United States, supra; Murphy v. United States, supra; Stevens v. McClaughry, 8 Cir., 207 F. 18.

But it is argued that the possession to be criminal must have been "with intent to use such plate * * * or suffer the same to be used, in the forging or counterfeiting any such obliga-
31 tion or other security, or any part thereof." Mere possession is not made a crime by this statute. That possession would be innocent were it not possessed with intent to use the plate in counterfeiting.

We must therefore consider whether the conceded facts involved in the offense charged in Count 1 were sufficient to show that appellant's possession was with intent to use the plate for counterfeiting. Intent is a mental condition, invisible to human eyes, and is rarely susceptible of direct proof. The criminal does not ordinarily proclaim or announce in advance his intention to commit a crime. Intent, like any other fact, may be proved by circumstantial evidence (Majestic Securities Corp. v. Commissioner, 8 Cir., 120 F. 2d 12; State v. Gardner, Mont., 249 P. 574; 20 Am. Juris. Sec. 340), and ordinarily must be implied from the proven facts and circumstances, including the actions of the person whose intent is in question. It is inferable whenever the means used are such as would ordinarily result in the commission of the forbidden act. This is too elementary to warrant the citation of authorities. Proof of the possession of this plate by one who had unlawfully produced it, in connection with the character of the plate, was, unexplained, not only prima facie proof of criminal intent, but convincing evidence of it. As has been observed, the act of making this plate was an unlawful act, and it came into possession of the appellant by reason of this unlawful act. Evidence of the unlawful making and the resulting possession was competent proof going to the question of intent. The possession resulted from the committing of the crime described in the first count. The plate on its face disclosed its purpose, and the facts were ample to sustain proof of the allegation that appellant's possession was for the purpose of counterfeiting. It is scarcely conceivable that any other or additional facts could have been adduced in support of that allegation.

32 Strictly speaking, the erroneous imposition of two penalties for a single offense does not constitute double jeopardy. The sentence is void as to the excess and in such circumstances the remedy is to apply to vacate the sentence and for re-sentence, or to correct the sentence by eliminating the excess. Holiday v. Johnston, 313 U. S. 342; White v. Pescor, Warden, 8 Cir., 155 F. 2d 902.

The conclusion which we have reached is in conflict with certain decisions of the Ninth Circuit, notably Matthews v. Swope, 111 F.

2d 697, and later decisions of that court which followed the doctrine of the earlier decision. In Matthew v. Swope, supra, appellant pleaded guilty to two counts of an indictment charging violation of Section 264, Title 18 U. S. C. A., the sentences to run consecutively. In referring to the contention of double jeopardy, the court said,

"Appellant further urges that he was subjected to 'double jeopardy' because the facts alleged in Counts One and Two of the California indictment constitute but a single offense; that the plates, negatives and prints which Count One charged that he made or caused to be made, are the same plates which Count Two charges that he possessed. Since the proof necessary to support the first count is different from and additional to that required to support the second count, we must hold against appellant, for the rule is 'where two offenses are charged having relation to the same matter of transaction there is no double jeopardy in making and trying the charges, if each offense requires proof of a fact which the other does not.' Remaley v. Swope, 9 Cir., 109 F. 2d 31–33."

This is all that was said by the court and it will be observed that the court assumed that the proof necessary to support the first count was different from and additional to that required to support the second count. In the instant case the first count is not
33 assailed, but the contention here is that proof of the first count also established the offense charged in the second count. In the instant case, confessedly, proof that would only support the second count would not necessarily be sufficient to support the first. It does not follow, however, that it will require any evidence in addition to that necessary to sustain the first count, to convict under the second count. It is our view that proof that appellant made the plate, or procured it to be made, likewise proved that he had possession of it. Apparently, the Swope case does not agree with this view. It, however, without discussing the question, simply assumes that evidence to sustain one of the counts would not be sufficient to sustain the other, and if correct in this conclusion it would, of course, follow that conviction on each count would not result in double jeopardy.

In Michener v. Johnston, 9 Cir., 141 F. 2d 171, in considering the question of double jeopardy, the court said,

"It is claimed that the first count of the indictment involved every element contained in the second, and that the petitioner after conviction on the first count would, if he were convicted on the second, be subject to double punishment for a single offense. This court held the contrary in Matthews v. Swope, 9 Cir., 111 F. 2d 697. * * * It is argued that the decision in Matthews v.

Swope was in error, in that proof of manufacture necessarily required also proof of possession. We need not stop to consider the point. In the present situation the petitioner was charged in the first count only with 'causing and procuring' the plate to be made. Proof of that count did not necessarily involve proof of possession, and indeed the record intimates that petitioner compelled an engraver, at the point of a pistol, to make the plate. In any event there is no showing that petitioner would now be entitled to his release even though the sentence on the second count be considered void."

34 The matter was before that court in a habeas corpus proceeding and the appellant had not served his full sentence on the first count so that whatever is said on this question is dictum and in none of the decisions is the question of proof of intent considered.

We conclude that the sentence and judgment are excessive and can not stand without modification. The order appealed from is therefore reversed and the cause is remanded with directions to modify and correct the sentence and judgment by vacating that part thereof which adjudges appellant guilty under the second count of the indictment.

35 In United States Circuit Court of Appeals, Eighth Circuit

ELLIOTT W. MICHENER, APPELLANT

vs.

UNITED STATES OF AMERICA

Judgment

October 23, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the order of the said District Court denying motion of appellant to vacate the sentence imposed and the judgment entered on the second count of an indictment, in this cause, be, and the same is hereby, reversed.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to modify and correct the sentence and judgment by vacating that part thereof which adjudges appellant guilty under the second count of the indictment.

36 In United States Circuit Court of Appeals

Motion of appellee to stay mandate

Filed November 6, 1946

Comes now the United States of America, appellee above named, and hereby petitions the said Honorable Court for a stay of mandate until November 22, 1946, the decision of said Court in the said proceedings having been filed on October 23, 1946, on the ground and for the following reasons, namely:

1. That the Department of Justice is of the opinion that there is a conflict of decisions between the Circuit Court of Appeals and what appears to it to be a conflict in principle between the decision in the above case and prior decisions of the United States Supreme Court, and that therefore a Petition for Writ of Certiorari to the United States Supreme Court may be determined to be desirable therein.

2. On the further ground that an extension of the stay of mandate is necessary to allow time for possible Petition for Writ of Certiorari by the United States therein.

Dated November 4, 1946.

VICTOR E. ANDERSON,
United States Attorney
for the District of Minnesota,
Attorney for Appellee.

[File endorsement omitted.]

37 In United States Circuit Court of Appeals

Order staying issuance of mandate

November 7, 1946

On Consideration of the motion of appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

38 [Clerk's certificate to foregoing transcript omitted in printing.]

39 In the Supreme Court of the United States

Order extending time within which to file petition for a writ of certiorari

On consideration of the motion of the Acting Solicitor General in the above-entitled cause, and good cause therefor having been shown, it is now hereby ordered that the time within which a petition for a writ of certiorari may be filed herein be and the same is hereby extended for a period of thirty days from November 22, 1946.

Dated this 19th day of November 1946.

WILEY RUTLEDGE,
Associate Justice.

U. S. GOVERNMENT PRINTING OFFICE: 1948

Supreme Court of the United States

No. 793, October Term, 1946

Order allowing certiorari

Filed January 20, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

731438—47——2

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	5
Specification of errors to be urged	7
Reasons for granting the writ	8
Conclusion	15

CITATIONS

Cases:

Albrecht v. *United States*, 273 U. S. 1 ..... 8, 9, 12, 13
Blockburger v. *United States*, 284 U. S. 299 ..... 11, 12
Burton v. *United States*, 202 U. S. 344 11
Carter v. *McClaughry*, 183 U. S. 365 11
Curran v. *Sanford*, 145 F. 2d 229 14
District of Columbia v. *Buckley*, 128 F. 2d 17 12
Ebeling v. *Morgan*, 237 U. S. 625 11
Gavieres v. *United States*, 220 U. S. 338 11
Matthews v. *Swope*, 111 F. 2d 697 14
McMurtry v. *United States*, 139 F. 2d 482 14
Michener v. *Johnston*, 141 F. 2d 171, 146 F. 2d 129, certiorari denied, 324 U. S. 874 ..... 5, 6, 8
Morgan v. *Devine*, 237 U. S. 632 11
Norris v. *Hudspeth*, 114 F. 2d 1007 12
Pinkerton v. *United States*, No. 719, O. T. 1945, decided June 10, 1946 11
Power v. *Squier*, 130 F. 2d 868 14
Reger v. *Hudspeth*, 103 F. 2d 825, certiorari denied, 308 U. S. 549 14
Ross v. *Hudspeth*, 108 F. 2d 628 14
Steffler v. *United States*, 143 F. 2d 772, certiorari denied, 323 U. S. 746 12
United States v. *Raynor*, 302 U. S. 540 9
United States ex rel. Simkoff v. *Mulligan*, 67 F. 2d 321 14

Statute:

Section 150 of the Criminal Code (18 U. S. C. 264) 2

724420—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ELLIOTT W. MICHENER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit directing the District Court for the District of Minnesota to vacate the second of two consecutive fifteen-year sentences imposed upon respondent in 1936 for violations of Section 150 of the Criminal Code (18 U. S. C. 264) on the ground that the two counts of the indictment on which the sentences were imposed charged only one offense.

OPINION BELOW

The opinion of the circuit court of appeals (R. 16–23) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 23, 1946 (R. 23). On November 19, 1946, by order of Mr. Justice Rutledge, the Government's time for filing a petition for a writ of certiorari was extended to December 22, 1946 (R. 25). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, under Section 150 of the Criminal Code (18 U. S. C. 264), the offense of causing a counterfeit plate to be made on or about August 25, 1934, is identical with the offense of possessing the same plate on or about that date and thereafter with intent to use it in counterfeiting government obligations.

STATUTE INVOLVED

Section 150 of the Criminal Code (18 U. S. C. 264) provides:

> Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, shall use such plate, stone, or other

thing, or any part thereof, or knowingly suffer the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or *whoever by any way, art, or means shall make or execute, or cause, or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security;* or whoever shall sell any such plate, stone, or other thing, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; *or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof;* or whoever shall have in his possession or custody, except under authority

from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or whoever shall print, photograph, or in any other manner make or execute, or cause to be printed, photographed, made, or executed, or shall aid in printing, photographing, making or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or shall sell any such engraving, photograph, print, or impression, except to the United States, or shall bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than $5,000, or imprisoned not more than fifteen years, or both. [Italics added.]

STATEMENT

In 1935, respondent and a codefendant were indicted (R. 1–2) in two counts in the District Court for the District of Minnesota for violations of Section 150 of the Criminal Code (18 U. S. C. 264). The first count charged (R. 1) that on or about August 25, 1934, the defendants "unlawfully did cause and procure to be made a certain plate in the likeness of a plate designated and prepared by the direction of the Secretary of the Treasury of the United States" for the printing of a specified ten-dollar Federal Reserve note. The second count charged (R. 1–2) that "on or about August 25, 1934 and thereafter" the defendants unlawfully had the plate in their control, custody, and possession with intent to use it in counterfeiting described Federal Reserve notes. On May 12, 1936, respondent pleaded guilty and was sentenced on each count to imprisonment for fifteen years and to pay a fine of $5,000, the sentences to be served consecutively (R. 2–3).[1]

In 1941, respondent filed in the District Court for the Northern District of California a petition for a writ of habeas corpus, in which he con-

[1] It appears from the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Michener* v. *Johnston*, 141 F. 2d 171, 172 (see p. 6, *infra*), that at the time these sentences were imposed respondent was serving a thirty-five year sentence for forgery in the Wisconsin state prison. In 1939, after having served four years of the state sentence, he was released from state custody and surrendered to federal authorities to serve his federal sentences.

tended, *inter alia,* that the offense charged in the first count of the indictment embraced every element of the offense alleged in the second count and, therefore, he had been subjected to double punishment for one offense. On appeal from an order discharging the writ of habeas corpus, the Circuit Court of Appeals for the Ninth Circuit held, relying on its earlier decisions, that each count charged a separate offense. *Michener* v. *Johnston,* 141 F. 2d 171, 174.[2]

Thereafter, on March 26, 1946, respondent filed in the convicting court the present motion to vacate the sentence imposed on count 2 upon the ground previously urged in the district court in California, i. e., that both counts charged only one offense (R. 3–5). The motion was denied on April 22, 1946 (R. 10). On appeal to the Circuit Court of Appeals for the Eighth Circuit, the order of the district court was reversed and the cause remanded to the district court with directions to vacate the judgment in respect of the second count (R. 23). The court below, expressly recog-

[2] The circuit court of appeals also pointed out that in any event respondent was not then entitled to be released, even though the sentence on the second count was considered void. The court remanded the cause to the district court for a specific finding on the issue of fact whether respondent had intelligently waived the right of assistance of counsel upon his arraignment on the indictment. The district court found that respondent did in fact intelligently waive his right in this regard, and that finding was thereafter affirmed by the circuit court of appeals. 146 F. 2d 129, certiorari denied, 324 U. S. 874.

nizing (R. 21–22) that its decision was in conflict with decisions of the Circuit Court of Appeals for the Ninth Circuit, held that every element of the offense of possessing a proscribed plate with intent to use it for counterfeiting was included in the offense of causing such a plate to be made. The court reached this result by invoking a doctrine of constructive possession which enabled it to conclude that during the period when the defendants were causing the plate to be made, they were constructively in possession of it. Accordingly, the court held that the evidence required to show that the defendants caused the plate to be made also showed that they possessed it.

SPECIFICATIONS OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that the offense of causing a counterfeit plate to be made is identical with the offense of thereafter possessing the plate with the specific intent to use it for counterfeiting government obligations.

2. In holding that one who causes such a plate to be made is a possessor of it with the intent to use it for counterfeiting at the very time that he is causing another person to make the plate.

3. In holding that the sentences imposed were excessive and in directing that the sentence on count 2 be vacated.

724420—46——2

REASONS FOR GRANTING THE WRIT

The opinion of the Circuit Court of Appeals for the Eighth Circuit recognizes (R. 21–22) that "the conclusion which we have reached is in conflict with certain decisions of the Ninth Circuit, notably *Matthews* v. *Swope*, 111 F. 2d 697, and later decisions of that court which followed the doctrine of the earlier decision." Among the decisions of the Ninth Circuit with which the decision below is in conflict is a decision on the very indictment involved in this case, in which the Ninth Circuit held that each count charged a separate offense. *Michener* v. *Johnston*, 141 F. 2d 171, 174. Although the court below did not note the fact, its decision is also in conflict in principle with the decision of this Court in *Albrecht* v. *United States*, 273 U. S. 1, 11–12, and with decisions of the Second, Fifth, and Tenth Circuits to which we shall advert (*infra*, p. 14). In view of the conflict of decisions and in view of the importance of the decision below in the administration and enforcement of the criminal laws, particularly those contained in Chapter 7 of the Criminal Code, we submit that the question presented is an important one which should be resolved by this Court.

1. There is no question that Congress may punish separately each step leading to the consummation of a transaction which it has the power to prohibit, and may also punish the com-

pleted transaction. *Albrecht* v. *United States,* 273 U. S. 1, 11–12. It is likewise indisputable that Section 150 of the Criminal Code, upon which this prosecution was based, reaches each stage of the counterfeiting transaction from the making of the plate to the uttering of the counterfeit obligation by making it a separate offense to do any of the proscribed acts. In *United States* v. *Raynor,* 302 U. S. 540, 548, the Court was concerned with a different clause of Section 150, but after extensively reviewing the long legislative history of the statute, the Court stated:

> The provision of law here construed is the last of seven separate offenses set out in one paragraph of a chapter of the Criminal Code entitled "Offenses against the Currency." The provisions of this chapter were enacted to prevent and punish counterfeiting. Six closely connected companion offenses are set out in the same section with the offense charged against respondents and all either penalize the possession of, or trafficking in, counterfeit obligations or the materials and devices used to make such obligations.

The charges in this case of causing a proscribed plate to be made and of thereafter possessing it with intent to use it in counterfeiting government obligations are each founded upon a different clause of Section 150 and the legal elements of the offense described in each clause are different. Thus, to support count 1 the Government was

required to show that respondent (1) caused a plate to be made (2) in the likeness of a plate designated for the printing of obligations or securities of the United States. On the other hand, to support count 2, the Government was required to establish that respondent (1) had possession of the plate (2) with intent to use it for counterfeiting. The difference in the character of the legal elements is, we think, plain. The offense involved in count 1 contains no element of intent, and it reaches those who cause illegal plates to be made. The offense in count 2 requires that a specific intent be established, and it reaches those who, having that intent, possess plates which have been made. Each relates to a different step in the counterfeiting transaction.

2. The court below recognized (R. 18) that the two charges could involve different offenses, but it concluded that because both counts related to only one plate, the evidence necessary to support count 1 also would establish the offense charged in count 2, and that the two counts are thus factually identical. To reach this conclusion the court invoked a theory of constructive possession. Reasoning from the premise that the possession of the person who made the plate was in law the possession of respondent, the court held that evidence showing that respondent caused another to make the plate showed also that he possessed the plate at the same time. To satisfy the element of the specific intent required to support count 2,

the court reasoned that that intent was inferable from the fact that respondent caused the plate to be made.

We think that the court below erred in relying upon the fiction of constructive possession as a legal basis for its conclusion that the evidence which proved that respondent procured the plate to be made, likewise proved that he had it in his possession with the specific intent required by the statute in connection with the offense of possession. None of the decisions upon which the court relied as supporting a theory of constructive possession applied that theory in a context such as is involved in the present case. Apart from this fact, however, we think the basic misconception in the decision below is its failure to distinguish between cases in which one act is the foundation for more than one criminal charge,[3] and cases, such as this, where successive acts in one transaction are the basis for more than one criminal charge.[4]

[3] For examples, see *Gavieres* v. *United States*, 220 U. S. 338; *Blockburger* v. *United States*, 284 U. S. 299.

[4] This Court has rejected the double punishment argument in prosecutions for conspiring to commit an offense and for committing the offense, *Carter* v. *McClaughry*, 183 U. S. 365; see also, *Pinkerton* v. *United States*, No. 719, O. T. 1945, decided June 10, 1946; for agreeing to receive a bribe and for receiving it, *Burton* v. *United States*, 202 U. S. 344; for breaking into a post office with intent to commit larceny and for committing larceny at the post office, *Morgan* v. *Devine*, 237 U. S. 632; for cutting each mail bag, even though all were cut in the course of one transaction, *Ebeling* v. *Morgan*, 237

In the former situation, where the possession relied upon is merely an incident to another illegal activity such as making a plate, there may be some basis for arguing that there is no substantial difference between the two charges. See fn. 6, *infra*, p. 13, and see *District of Columbia* v. *Buckley*, 128 F. 2d 17, 21 (App. D. C.) (concurring opinion). But where, as here, there is a sharply-defined illegal possession separate from a possession incident to the manufacture of the plate, it is plain that each is a separate step which is a crime in itself and is separately punishable.

As we read the indictment, count 1 relates to the causing of the plate to be made at a specified time and count 2 relates to possession of the plate after it was made, with criminal intent.[3] Each relates to a different step in the transaction. In our view, this factual picture cannot be distinguished from that in *Albrecht* v. *United States*, 273 U. S. 1, 11–12, in which this Court rejected a claim of double punishment where the defendant was separately sentenced for possessing liquor for

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U. S. 625; for sales on successive days to the same purchaser of a drug not in the original stamped package, *Blockburger* v. *United States*, 284 U. S. 299; and for possessing and thereafter selling the same liquor, *Albrecht* v. *United States*, 273 U. S. 1, 11–12.

[3] Respondent's plea of guilty to both counts of the indictment is, of course, an admission of the facts pleaded (*Steffler* v. *United States*, 143 F. 2d 772 (C. C. A. 7), certiorari denied, 323 U. S. 746; *Norris* v. *Hudspeth*, 114 F. 2d 1007 (C. C. A. 10)), and the identity of the offenses must therefore be tested in the light of the pleaded facts.

a period of time and for then selling the same liquor. Notwithstanding the fact that the proof of the sale must have shown that the defendant then possessed the liquor, the Court, speaking through Mr. Justice Brandeis, upheld the Government's position because the defendant was being punished for separate steps in the transacton.[6] Similarly, in this case, causing the plate to be made was one offense and possessing it thereafter with the required intent was another. Each was a successive step in the transaction and each involved a different evil at which Congress sought to strike. The fact that the same plate was

[6] The present case and the *Albrecht* case should be distinguished from the liquor cases relied upon by the court below to support its conclusion (R. 18–20). In each of those cases, the facts show that on a given day government agents raided a designated place and found an illicit still in operation. On the basis of these facts the defendants were charged with illegally possessing equipment to manufacture liquor, with contemporaneously possessing the liquor and with at the same time manufacturing the liquor. The decisions relied upon by the court held that proof of manufacturing also proved that the defendants at the same time possessed the equipment and the liquor. The situation would have been different, we think, if the cases involved successive acts in the transaction. If the charges were that on a fixed date the defendant manufactured liquor and for a time thereafter he possessed it, there would be a proper basis for two sentences, as in the *Albrecht* case, where possession and then a sale of the same liquor supported two sentences. The difference is between a possession which is a mere incident to the manufacturing or selling and a sharply defined possession which continues for some time and is separable from the act of selling or manufacturing.

involved in both counts is of no greater significance than the fact in the *Albrecht* case that the same liquor was first possessed and then sold.

3. As we have said, the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in passing on respondent's earlier habeas corpus case, *supra*, and with an earlier decision of that court, *Matthews* v. *Swope*, 111 F. 2d 697. It is likewise in conflict in principle with *Power* v. *Squier*, 130 F. 2d 868 (C. C. A. 9), where the defendant was sentenced separately for manufacturing a mold for the making of fifty-cent pieces and for possessing the mold; with *United States ex rel. Simkoff* v. *Mulligan*, 67 F. 2d 321 (C. C. A. 2), in which consecutive sentences were sustained for possessing and selling the same counterfeit note; with *McMurtry* v. *United States*, 139 F. 2d 482 (C. C. A. 5), certiorari denied, 321 U. S. 783, which involved separate sentences for possessing and passing an altered obligation of the United States; with *Reger* v. *Hudspeth*, 103 F. 2d 825 (C. C. A. 10), certiorari denied, 308 U. S. 549; *Ross* v. *Hudspeth*, 108 F. 2d 628, 629 (C. C. A. 10); and *Curran* v. *Sanford*, 145 F. 2d 229 (C. C. A. 5), which involved separate sentences for possessing counterfeit coins and passing them.

4. If the decision below is allowed to stand, respondent and his codefendant will be entitled to

have the fifteen year sentences and the $5,000 fines imposed under count 2 vacated. Other persons serving sentences for violations of Section 150 or the related provisions in Chapter 7 of the Criminal Code will likewise be in a position to challenge successfully the imposition of two sentences where they have been convicted on separate counts for possessing and selling or possessing and manufacturing or possessing and uttering proscribed matter as separate steps in one criminal transaction. The novel decision below thus presents an important question which, we submit, merits consideration by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

DECEMBER 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and constitutional provision involved	2
Statement	5
Specification of errors to be urged	9
Summary of argument	9
Argument:	
Consecutive sentences may be imposed under Section 150 of the Criminal Code against one who makes or causes a plate to be made and thereafter possesses the plate for the purpose of counterfeiting	12
(a) Congress intended the offenses here involved to be distinct offenses, separately punishable, even though the possessor of the plate made it himself or caused someone else to make it for him	14
(b) Constitutional considerations do not preclude separate punishments for the two offenses	19
Conclusion	31

CITATIONS

Cases:

Albrecht v. *United States*, 273 U. S. 1 ... 11, 12, 19, 20, 22, 26, 27
Blockburger v. *United States*, 284 U. S. 299 ... 22, 23
Burton v. *United States*, 202 U. S. 344 ... 19, 23, 26
Cain v. *United States*, 19 F. 2d 472 ... 25
Carter v. *McClaughry*, 183 U. S. 365 ... 21, 22
Chapman, In re, 166 U. S. 661 ... 24
Crain v. *United States*, 162 U. S. 625 ... 30
Curran v. *Sanford*, 145 F. 2d 229 ... 24
Diaz v. *United States*, 223 U. S. 442 ... 23, 29
District of Columbia v. *Buckley*, 128 F. 2d 17 ... 21, 28, 30
Ebeling v. *Morgan*, 237 U. S. 625 ... 14, 23
Flemister v. *United States*, 207 U. S. 372 ... 23
Gavieres v. *United States*, 220 U. S. 338 ... 21, 22
Grafton v. *United States*, 206 U. S. 333 ... 28, 30
Holiday v. *Johnston*, 313 U. S. 342 ... 7
Hotema v. *United States*, 186 U. S. 413 ... 23
Kaye v. *United States*, 177 Fed. 147 ... 17
King v. *United States*, 280 U. S. 521, affirming 31 F. 2d 17 ... 22, 25
McMurtry v. *United States*, 139 F. 2d 482, certiorari denied, 321 U. S. 783 ... 24

Cases—Continued — Page

Matthews v. *Swope*, 111 F. 2d 697 — 24
Michener v. *Johnston*, 141 F. 2d 171, 146 F. 2d 129, certiorari denied, 324 U. S. 874 — 6, 7, 13, 24
Morgan v. *Devine*, 237 U. S. 632 — 14, 19, 23
Morgan v. *United States*, 294 Fed. 82 — 25, 26
Murphy v. *United States*, 285 Fed. 801, certiorari denied, 261 U. S. 617 — 25
Nielsen, Hans, Petitioner, 131 U. S. 176 — 14, 28, 29, 30
Norris v. *Hudspeth*, 114 F. 2d 1007 — 13
Patrilo v. *United States*, 7 F. 2d 804 — 25, 26
Penfield Co. v. *Securities and Exchange Commission*, No. 453, present Term, decided March 31, 1947 — 24
Pinkerton v. *United States*, 328 U. S. 640 — 22
Power v. *Squier*, 130 F. 2d 868 — 24
Reger v. *Hudspeth*, 103 F. 2d 825, certiorari denied, 308 U. S. 549 — 24
Reynolds v. *United States*, 280 Fed. 1, modified, 282 Fed. 256 — 25, 26
Ross v. *Hudspeth*, 108 F. 2d 628 — 24
Simkoff, United States ex rel. v. *Mulligan*, 67 F. 2d 321 — 24, 28
Snow, In re, 120 U. S. 274 — 14, 30
Steffler v. *United States*, 143 F. 2d 772, certiorari denied, 323 U. S. 746 — 13
Stevens v. *McClaughry*, 207 Fed. 18 — 25
Tritico v. *United States*, 4 F. 2d 664 — 14, 25, 26
United States v. *Adams*, 281 U. S. 202 — 24, 31
United States v. *Daugherty*, 269 U. S. 360 — 23
United States v. *Nickerson*, 17 How. 204 — 30
United States v. *Randenbush*, 8 Pet. 288 — 23
United States v. *Raynor*, 302 U. S. 540 — 10, 15, 16
United States v. *Wilson*, 7 Pet. 150 — 29

Constitution of the United States: Fifth Amendment — 5

Statutes:

Act of October 12, 1837, 5 Stat. 201, 203: Section 11 — 18
Act of February 25, 1862, c. 33, 12 Stat. 345, 347–348: Section 7 — 18
Act of June 30, 1864, c. 172, 13 Stat. 218, 221: Section 11 — 19
Criminal Code:
Section 147 (18 U. S. C. 261) — 4
Section 150 (18 U. S. C. 264) — 2, 5, 9, 10, 13, 15, 16, 17, 19

Miscellaneous:

Appendix to Government's Brief in *Raynor* case (Nos. 146, 147, October Term, 1937) — 18, 19
Federal Rules of Criminal Procedure: Rule 35 — 7
Senate Report 10, Part 1, p. 19, 60th Cong., 1st sess. — 19

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 793

THE UNITED STATES OF AMERICA, PETITIONER

v.

ELLIOTT W. MICHENER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 16–23) is reported at 157 2d 616.

JURISDICTION

The judgment of the circuit court of appeals was entered October 23, 1946 (R. 23). On November 19, 1946, by order of Mr. Justice Rutledge, the Government's time for filing a petition for a writ of certiorari was extended to December 22, 1946 (R. 25). The petition was filed December 17, 1946, and was granted January 20, 1947, the case being transferred to the summary

docket (R. 26). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether a defendant may be given consecutive sentences upon an indictment under Section 150 of the Criminal Code (18 U. S. C. 264) which charged, in the first count, that he caused a plate adapted for counterfeiting Government obligations to be made on or about August 25, 1934, and, in the second count, that he possessed the same plate on or about that date and thereafter with intent to use it in counterfeiting such obligations.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 150 of the Criminal Code (18 U. S. C. 264) provides:

> Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, shall use such plate, stone, or other thing, or any part thereof, or knowingly suffer the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, ex-

cept as may be printed for the use of the United States by order of the proper officer thereof; or *whoever by any way, art, or means shall make or execute, or cause, or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security;* or whoever shall sell any such plate, stone, or other thing, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; *or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof;* or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation

or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or whoever shall print, photograph, or in any other manner make or execute, or cause to be printed, photographed, made, or executed, or shall aid in printing, photographing, making or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or shall sell any such engraving, photograph, print, or impression, except to the United States, or shall bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than $5,000, or imprisoned not more than fifteen years, or both. [Italics added.]

Section 147 of the Criminal Code (18 U. S. C. 261) defines "obligation or other security of the United States" as follows:

> The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress, and canceled United States stamps.

The Fifth Amendment provides:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, * * *.

STATEMENT

In 1935 respondent and a co-defendant were indicted (R. 1–2) in two counts in the District Court for the District of Minnesota for violating Section 150 of the Criminal Code (18 U. S. C. 264). The first count charged (R. 1) that on or about August 25, 1934, at a certain address in Duluth, the defendants "unlawfully did cause and procure to be made a certain plate in the likeness of a plate designated and prepared by the direction of the Secretary of the Treasury of the United States" for the printing of a specified ten dollar Federal Reserve note. The second

count charged (R. 1–2) that "on or about August 25, 1934, and thereafter," at Duluth, the defendants unlawfully had the plate in their control, custody, and possession with intent to use it in counterfeiting ten dollar Federal Reserve notes. On May 12, 1936, the defendants pleaded guilty (R. 2), and respondent was sentenced on each count to imprisonment for 15 years and to pay a fine of $5,000, the sentences to be served consecutively and to commence upon the expiration of a sentence respondent was serving in the Wisconsin State Penitentiary.[1]

In 1941 respondent filed in the District Court for the Northern District of California a petition for a writ of habeas corpus, in which he contended, *inter alia*, that the offense charged in the first count of the indictment embraced every element of the offense alleged in the second count and therefore that he had been subjected to double punishment for the offense charged in the second count. On appeal from the order discharging the writ of habeas corpus, the Circuit Court of Appeals for the Ninth Circuit held, relying on its earlier decisions, that each count charged a sep-

[1] It appears from the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Michener* v. *Johnston*, 141 F. 2d 171, 172 (see *infra*), that at the time the Minnesota federal sentences were imposed respondent was serving a 35-year sentence for forgery in the Wisconsin State Penitentiary. In 1939, after having served 4 years of the state sentence, he was released from state custody and surrendered to the federal authorities to serve his federal sentences.

arate punishable offense. *Michener* v. *Johnston*, 141 F. 2d 171, 174.[2]

Thereafter, on March 26, 1946, respondent filed in the convicting court the motion in the present proceeding, accompanied by a supporting brief, to vacate the sentence imposed on count 2[3] upon the ground previously urged in the district court in California, i. e., that upon the basis of the allegations of the indictment he could not be given an additional sentence under count 2 because the offense charged in that count was covered by count 1 (R. 3–5, 5–8). The motion was denied (R. 10).

On appeal to the Circuit Court of Appeals for the Eighth Circuit, the order of the district court was reversed and the cause remanded with directions to vacate the judgment in respect of the second count (R. 23). The court below, ex-

[2] The circuit court of appeals also pointed out that in any event respondent was not then entitled to be released, even though the sentence on the second count should be considered void, because he had not yet served his sentence on the first count. However, the court remanded the case to the district court for a specific finding of fact on the issue whether respondent had intelligently waived the right of assistance of counsel upon his arraignment on the indictment. The district court found that respondent did in fact intelligently waive his right in this regard, and that finding was thereafter affirmed by the circuit court of appeals. 146 F. 2d 129, certiorari denied, 324 U. S. 874.

[3] Cf. *Holiday* v. *Johnston*, 313 U. S. 342, 349. Rule 35 of the Federal Rules of Criminal Procedure provides that "The court may correct an illegal sentence at any time."

pressly recognizing that its decision was in conflict with decisions of the Circuit Court of Appeals for the Ninth Circuit (R. 21–22), held that the evidence which would sustain the first count would necessarily also sustain the second count, with the result that there would be double punishment if a consecutive sentence were permitted on the second count. It reached its conclusion in this way: Respondent, it is charged, caused the plate to be made. The person who made it was, hence, his agent, and respondent was in constructive possession of it the moment it was finished. Proof of the first count consequently proved possession in respondent. Possession is a continuing offense and is not augmented or divisible into separate offenses because it may continue for more than a day (R. 18, 22). The conceded facts involved in the offense charged in count 1 were also sufficient to show that respondent possessed the plate with intent to use it for counterfeiting, an element of the offense of possession charged in count 2. These were that respondent had to commit a crime to get possession of a plate which, on its face, disclosed its purpose to be for counterfeiting. "Proof of the possession of this plate by one who had unlawfully produced it, in connection with the character of the plate, was, unexplained,[4] not only prima facie proof of criminal intent, but convincing evidence of it. * * * It

[4] The court evidently refers to respondent's plea of guilty.

is scarcely conceivable that any other or additional facts could have been adduced in support of [the] allegation" that respondent's possession was for the purpose of counterfeiting (R. 21).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that on the facts appearing in the indictment respondent could not be given consecutive sentences for the offenses of causing to be made a plate adapted for counterfeiting Government obligations and of thereafter possessing the plate with the specific intent to use it for counterfeiting such obligations.

(2) In directing that the sentence on count 2 be vacated.

SUMMARY OF ARGUMENT

The court below held, in effect, that Section 150 of the Criminal Code does not permit a separate punishment to be imposed for the offense of possessing a plate with the intent to use it for counterfeiting Government obligations (count 2) if the possessor of the plate caused another to make it for him (count 1), or made it himself and was punished for that offense; that the offense of manufacturing includes the offense of possession and, hence, that it would be double punishment to permit an additional sentence for the latter offense. There is no basis for the holding either in the language or purpose of the statute, its legislative history, or constitutional considerations.

A. The legislative history, reviewed at length in *United States* v. *Raynor*, 302 U. S. 540, reveals that because of the increasingly serious menace of counterfeiting, which was not adequately combatted by the existing criminal sanctions against making, uttering, and passing counterfeit money, Congress, by successive enactments strengthened the Government's hand against the counterfeiter, an evolutionary process which culminated in an entire chapter of the Criminal Code in which Congress manifested the purpose of striking hard at every separable step which might in any way contribute to the evil of circulating counterfeit Government obligations.

In the second clause of Section 150, the one on which the first count is predicated, Congress was concerned alone with the act of making a plate, regardless of the purpose for which it is made or into whose hands the plate passes or how it gets there. Such a plate, simply, must not be made; it is a dangerous thing *per se* to make a plate in the likeness of one from which genuine Government obligations are printed. The offense is completed at the moment the plate is made.

But in the fourth clause, the one on which the second count is predicated, Congress dealt with a step which succeeds the manufacture of the plate. It was not at all interested in that clause in whether the possessor or someone else made the plate or caused it to be made, or whether the plate was made initially for an evil purpose. Its concern was solely with the act of possessing a

plate with the intent to use it for counterfeiting. "Whoever" possesses such a plate with the proscribed intent is punishable. No exception is made. Contrary to the holding below, it cannot matter, therefore, that the possessor of the plate himself made it or caused someone else to make it for him and was punished for the making of the plate.

B. The double-jeopardy provision does not prevent the carrying out of the Congressional purpose that the second and fourth clauses of Section 150 be regarded as defining completely distinct offenses, separately punishable. In *Albrecht* v. *United States*, 273 U. S. 1, not considered below, the provision was held to be no barrier to separate sentences for possession and sale of intoxicating liquor in violation of the National Prohibition Act, even though on the facts of the case the same liquor was involved and the defendants could not have sold without having possessed. This result was reached because Congress intended to, and did, differentiate between the offenses of possession and sale and "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction" (p. 11). The present case is indistinguishable in principle.

The decisions of this Court illustrate, we think, that no matter how closely offenses may be related, the criterion which has guided this Court,

in the application of the double-jeopardy principle, is whether the difference between the offenses is merely formal or whether each is aimed at a substantially distinct evil, as here.

The National Prohibition Act cases relied upon below were decided prior to the *Albrecht* case and are inconsistent both in rationale and result with that decision. There are, moreover, factual differences between those cases and the instant case. Thus, the possession count in this case was based upon a duration of possession not reflected in those cases.

The "included offense" doctrine upon which those decisions, as well as that below, rest can only apply where one offense is necessarily an ingredient or an incident or a part of another. It can have no application where each crime, as in the instant case, relates to an entirely distinct evil and the second offense does not come into being until after the first has been committed.

ARGUMENT

CONSECUTIVE SENTENCES MAY BE IMPOSED UNDER SECTION 150 OF THE CRIMINAL CODE AGAINST ONE WHO MAKES OR CAUSES A PLATE TO BE MADE AND THEREAFTER POSSESSES THE PLATE FOR THE PURPOSE OF COUNTERFEITING

The court below concedes that "There can be no doubt but that separate offenses might be charged and proved" under the provisions of Section 150 of the Criminal Code here involved (R. 18), and it further concedes that (R. 22) "In the

instant case, confessedly, proof that would only support the second count [the possession count] would not necessarily be sufficient to support the first [causing the plate to be made]." Notwithstanding the difference in the elements of the two offenses, it held that respondent's offense of possession of the plate with the intent to use it for counterfeiting [5] was absorbed by his offense of causing the plate to be made. The court below held, in essence, therefore, that there must be excluded from the purview of Section 150, as a separate punishable offense, the offense of possession where the possessor either makes the plate himself or causes someone else to make it for him [6] and is held criminally responsible for the

[5] Respondent's plea of guilty is, of course, an admission of the facts pleaded. *Steffler* v. *United States*, 143 F. 2d 772 (C. C. A. 7), certiorari denied, 323 U. S. 746; *Norris* v. *Hudspeth*, 114 F. 2d 1007 (C. C. A. 10).

[6] The allegations of the two counts make it evident that but one plate was involved and the court below points out in its opinion that the Government's attorney so conceded on oral argument in that court (R. 17). Also, it is a fair inference from the indictment that the plate passed immediately into the possession of respondent after it was finished and that there was no intervening possession; indeed, in the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Michener* v. *Johnston*, 141 F. 2d 171 at 174, it is stated that the record in that case "intimates that [respondent] compelled an engraver, at the point of a pistol, to make the plate." We take it that the case must be decided on the basis of the composite factual picture presented by both counts of the indictment rather than on the assumption that if the two counts be divorced from each other some hypothetical state of facts, not indicated by the indictment as a whole, might establish

latter offense.[7] In other words, the offense of possessing a plate may be prosecuted as a completely distinct and independent offense only where the possessor takes no part in the making of the plate.[8] The court's decision, we submit, finds no warrant either in the language or purpose of the statute, its legislative history, or constitutional considerations.

(a) ***Congress intended the offenses here involved to be distinct offenses, separately punishable, even though the possessor of the plate made it himself or caused someone else to make it for him.***

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each count without presenting the problem here involved. See *In re Snow*, 120 U. S. 274, 281–282; *Ebeling* v. *Morgan*, 237 U. S. 625, 627–628, see, also, *Hans Nielsen, Petitioner*, 131 U. S. 176, 185, 186; *Morgan* v. *Devine*, 237 U. S. 632, 636, 637.

[7] Presumably the court below would allow the possessor to be convicted of possession of the plate if he were not at the same time or had not previously been convicted of making or causing the plate to be made. *Cf. Tritico* v. *United States*, 4 F. 2d 664, 665 (C. C. A. 5), cited in the opinion below (R. 20). Additionally, the court below stated (R. 19) that "in the instant case, it may be conceded that under a possible state of facts one could properly be convicted of the two offenses charged in the indictment." The court does not indicate what this "possible state of facts" is, but, of course, it excluded the case before it.

[8] While the court below does not articulate its holding precisely in this language, it is manifest, under the court's process of reasoning, that in every case in which a defendant is convicted of making or causing to be made the same plate he is also convicted of possessing, the offense of possession will necessarily be merged with the offense of making or causing the plate to be made.

In *United States* v. *Raynor*, 302 U. S. 540, the Court, in an opinion by Mr. Justice Black, undertook an extensive review of the long history of the legislation embodied in Section 150 and related sections in connection with the construction of another clause of the section. The opinion points out (pp. 543–546, 548) that for many years the federal counterfeiting statutes had merely made it offenses to make, utter and pass counterfeit money. However, in 1837, and in the period between 1860 and 1864, due to panic and war conditions, unprecedented amounts of treasury obligations were issued, and counterfeiting became an increasingly serious menace. By enactment after enactment Congress strengthened the hand of the Government against the counterfeiter, and this evolutionary process culminated in an entire chapter of the Criminal Code, entitled "Offenses against the Currency," devoted to preventing and punishing counterfeiting (35 Stat. 1115).

The range of offenses covered by this chapter makes it manifest that Congress realized that it could not successfully combat the circulation of counterfeit government obligations unless it struck hard at every separable step which might in any way contribute to the accomplishment of that evil, from the importing or the making of plates to the making and uttering of counterfeit obligations themselves. Among the seven offenses set out in Section 150 of this chapter of the Criminal Code, there are several which deal with the

initial phases of counterfeiting, such as the making of bogus plates, the possession of such plates, the possession of paper similar to that used by the Government for printing its obligations, etc. Each of the seven "closely connected companion offenses" defined in the section are, as Mr. Justice Black stated, "seven separate offenses" (*United States* v. *Raynor*, 302 U. S. at 548). Each clause is separated from the others by a semicolon; some require a specific intent; others are aimed at particular acts irrespective of intent. There is not a word to indicate that violation of one clause absolves an offender from criminal responsibility for violation of another.

In respect of the two clauses here involved, the second and fourth, it is manifest that the second, the one on which the first count is predicated, is concerned alone with the act of making a plate; anyone who makes a plate or causes or assists another to make one is punishable. Congress was not at all concerned in this clause in the purpose for which a plate is made. It might be made for an entirely innocuous purpose. Neither was it important to it whether the plate is made by or for one who thereafter possesses it, or whether it comes into the custody of the possessor in some other way. It is a dangerous thing in and of itself to make plates in the likeness of those from which genuine Government obligations are printed. Such plates, however innocent the

purpose of the maker, might get into the hands of those inclined to use them for counterfeiting. Simply, they must not be made." Hence, the precise evil at which Congress directed the second clause is solely the making of a plate and the offense is completed the moment that is accomplished.

However, the fourth clause, the one on which the second count is based, approaches one step closer to the ultimate objective of Congress, the prevention of the circulation of counterfeit Government obligations. Congress, in the fourth clause, provided a criminal penalty for "whoever" should have in his control, custody, or possession a plate in the similitude of a plate from which any genuine Government obligation has been printed "with intent to use such plate, * * * or to suffer the same to be used in forging or counterfeiting any such obligation * * *, or any part thereof." It is evident that in this clause Congress was concerned with an aspect of counterfeiting entirely distinct from that in which it was interested in the second clause. In the fourth clause it was dealing with an offense which succeeds the manufacturing of a plate, an offense which comes into being when manufacture ends and which might, and probably would, have duration. The clause provides that no one, without ex-

[*] Cf. *Kaye* v. *United States*, 177 Fed. 147, 150 (C. C. A. 7).

ception, shall have in his possession a plate which he intends to use for counterfeiting. Congress was not at all concerned with who made the plate or caused it to be made, the possessor or someone else, or with whether the plate was made originally for an innocent or an evil purpose. It was interested solely in the act of possessing a plate with the proscribed intent, regardless of how or when the possessor got the plate or from whom he got it. Consequently, it is manifest that Congress, contrary to the decision below, intended to penalize as an offense separate and apart from the offense of making or causing a plate to be made, the offense of thereafter possessing the plate for the purpose of using it for counterfeiting, irrespective of whether the possessor of the plate himself made it or procured or caused someone else to make it for him and was punished for the making of the plate.[10]

[10] The statutes pertinent to the long legislative history of Section 150 are copied, from the beginning, in the Appendix to the Government's brief (pp. 37–63) in the *Raynor* case (Nos. 146, 147, October Term, 1937). The two provisions here involved had their genesis in Section 11 of the Act of October 12, 1837, c. 2, 5 Stat. 201, 203. At that time both crimes required that they be committed with the intent that the plate should be used for counterfeiting. The penalty was imprisonment at hard labor for a term of three to ten years and a fine not exceeding $5,000 (*Raynor* Brief, pp. 42–43). The provisions remained in this form through successive enactments (*Raynor* Brief, pp. 43–47) until the Act of February 25, 1862, c. 33, sec. 7, 12 Stat. 345, 347–348, when it was provided that the intent in connection with the crime of mak-

(b) *Constitutional considerations do not preclude separate punishments for the two offenses.*

It is elementary, of course, that the power to define and prescribe the punishment for offenses against the United States resides in Congress (*Burton* v. *United States,* 202 U. S. 344, 377–378; *Morgan* v. *Devine,* 237 U. S. 632, 639). And it cannot now be doubted that Congress may, without offending the double-jeopardy provision, penalize every step which may contribute to the consummation of an evil which it has the power to punish, regardless of whether the same or different persons take the various steps, and may at the same time punish the ultimate evil itself. Thus, in *Albrecht* v. *United States,* 273 U. S. 1, to which no consideration was given in the opinion below,

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ing plates was required to be that the plates be made for some purpose other than printing notes, bonds and other obligations for the use of the United States, and that the term of permissible imprisonment be fifteen years (*Raynor* Brief, pp. 49, 50). In the Act of June 30, 1864, c. 172, sec. 11, 13 Stat. 218, 221, it was specified that either a fine or imprisonment or both could be imposed (*Raynor* Brief, pp. 53, 54). Intent in connection with the making of plates was eliminated when the legislation took its present form as Section 150 of the Criminal Code; there was also eliminated the provision that imprisonment be at hard labor (*Raynor* Brief, pp. 58–60). The Special Joint Committee on the Revision of the Laws, in reporting the section, then Section 151 (Senate Report 10, Part 1, p. 19, 60th Cong., 1st sess.) stated: "This section is broadened so as to embrace every method which may be employed in counterfeiting the obligations of the United States, and its provisions are extended so as to apply in any place under the jurisdiction of the United States."

the defendants were convicted of possession and sale of liquor. Their contention was that the liquor which they were convicted of having sold was the same liquor which they were convicted of having possessed, and as they could not have sold such liquor without having possessed it, therefore their conviction of having sold necessarily included the offense of having possessed, so that in imposing upon them separate penalties for the sale and possession the district court had subjected them to double punishment for the possession, contrary to the Fifth Amendment. This Court rejected the argument because Congress intended to, and did, create distinct offenses,[11] and "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction" (p. 11). The instant case is indistinguishable in principle. In the *Albrecht* case the defendants were convicted for participation in one step in the transaction and for participating in the completed transaction—the sale. In the present case re-

[11] Thus the Court stated (p. 11): "One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he never had possession; and one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offense".

spondent was convicted for participation in two distinctive steps in the counterfeiting transaction preliminary to the accomplishment of the ultimate evil at which the legislation strikes.

This Court, in determining whether there is a difference between offenses in the application of the double-jeopardy clause, has generally applied what has become known as the "same or different evidence" test,[12] a test which if it discloses a difference will, as Mr. Justice Rutledge pointed out in his concurring opinion in *District of Columbia* v. *Buckley*, 128 F. 2d 17, 21, usually show that, as here, the difference is substantial. But, essentially, it seems to us, the decisions in this Court which have held, in particular cases, that double-jeopardy does not exist, have come down to the proposition, whether it be expressly articulated or merely arrived at intuitively, that a separate punishment was permissible because each offense was aimed at a substantially distinct evil. And this principle has been applied no matter how closely the offenses are related, whether they are occasioned by one act or grow out of one transaction or course of conduct, whether they are motivated by one intent, or whether the same evidence in fact establishes each.

[12] Shortly stated, this test, as recited in *Carter* v. *McClaughry*, 183 U. S. 365, 395, *Gavieres* v. *United States*, 220 U. S. 338, 342, 344, and other cases, is whether the same evidence is required to sustain the offenses involved.

The principle, we think, is illustrated in the decisions which, in addition to the *Albrecht* case,[13] have rejected the double-jeopardy argument in prosecutions for insulting a public official and for disorderly conduct growing out of the same incident (*Gavieres* v. *United States*, 220 U. S. 338); for making a single sale of narcotics in violation of the order form and original stamped package provisions of the Harrison Act (*Blockburger* v. *United States*, 284 U. S. 299, 303–304); for conspiring to commit an offense and for committing the offense, even though the substantive offense may be the overt act of the conspiracy (*Carter* v. *McClaughry*, 183 U. S. 365, 394–395; *Pinkerton* v. *United States*, 328 U. S. 640, 643–644); for conduct unbecoming an officer and a gentleman and for conspiracy to defraud and the causing of fraudulent claims to be made, "although to be guilty of the latter involves being guilty of the former" (*Carter* v. *McClaughry*, 183 U. S. 365, 395); for agreeing to receive proscribed compensation and for receiving such compensa-

[13] In *King* v. *United States*, 280 U. S. 521, this Court affirmed, *per curiam*, on the authority of the *Albrecht* case, a decision of the Circuit Court of Appeals for the Ninth Circuit (31 F. 2d 17) holding that a conviction of the offense of selling morphine not in or from the original stamped package is not a bar to a subsequent prosecution for the offense of shipping morphine in interstate commerce, without having registered or paid the special tax, even though the same morphine was involved in the two cases; the two offenses being perfectly distinct as a matter of law.

tion (*Burton* v. *United States*, 202 U. S. 344, 377–378); for breaking into a post office with intent to commit larceny and for committing larceny at the post office (*Morgan* v. *Devine*, 237 U. S. 632); for cutting each of a number of mail bags, even though all were cut in the course of one transaction (*Ebeling* v. *Morgan*, 237 U. S. 625); for sales on successive days to the same purchaser of a narcotic drug not in the original stamped package (*Blockburger* v. *United States*, 284 U. S. 299, 301–303); for unauthorized sales of cocaine to three different persons on different days, as against the contention that the several offenses constituted a single continuous act inspired by the same intent (*United States* v. *Daugherty*, 269 U. S. 360, 361, 363); for passing two different counterfeit notes of the same denomination (*United States* v. *Randenbush*, 8 Pet. 288); for three murders on the same day, as to two of which the defendant was acquitted on the ground of insanity (*Hotema* v. *United States*, 186 U. S. 413, 421–422); for assaults on two individuals, even though they occurred "very near each other in one continuing attempt to defy the law" (*Flemister* v. *United States*, 207 U. S. 372, 375); for homicide, where the accused had been convicted of assault and battery before the death of the injured person (*Diaz* v. *United States*, 223 U. S. 442, 448–449); for making a false entry in the books of a bank, showing a credit, and later

making a false entry in a report of the condition of the bank, showing the same credit (*United States* v. *Adams*, 281 U. S. 202, 204–205).[14] Cases dealing specifically with the counterfeiting statutes in the lower federal courts are referred to in the footnote.[15]

The court below, to support its holding, relies principally upon a group of cases under the Na-

[14] In *Penfield Co.* v. *Securities and Exchange Commission*, No. 453, present Term, decided March 31, this Court, in a contempt proceeding, said: "When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. At least in that situation the offenses are not the same. And the most that the statute forbids is the imposition of both fine and imprisonment for the same offense." (Slip opinion, p. 8.) See also *In re Chapman*, 166 U. S. 661, 672.

[15] In addition to *Michener* v. *Johnston*, 141 F. 2d 171, 174 (C. C. A. 9), holding that the instant indictment charged offenses separately punishable, see *Matthews* v. *Swope*, 111 F. 2d 697 (C. C. A. 9), which sustained consecutive sentences for making and possessing the same counterfeiting plates; *Power* v. *Squier*, 130 F. 2d 868 (C. C. A. 9), where the defendant was sentenced separately for manufacturing molds for the making of fifty-cent pieces and for possessing the molds; *United States ex rel. Simkoff* v. *Mulligan*, 67 F. 2d 321 (C. C. A. 2), in which consecutive sentences were sustained for possessing and selling the same counterfeit note (see also *Ross* v. *Hudspeth*, 108 F. 2d 628 (C. C. A. 10)); *McMurtry* v. *United States*, 139 F. 2d 482 (C. C. A. 5), certiorari denied, 321 U. S. 783, which involved separate sentences for possessing and passing an altered obligation of the United States; and *Reger* v. *Hudspeth*, 103 F. 2d 825 (C. C. A. 10), certiorari denied, 308 U. S. 549, which involved separate sentences for possessing counterfeit coins and passing them; see also *Curran* v. *Sanford*, 145 F. 2d 229 (C. C. A. 10).

tional Prohibition Act which held that one could not be punished for manufacturing liquor and at the same time also be punished for possessing the equipment to manufacture the liquor or for possessing the liquor manufactured (R. 20).[16] The theory of these cases was, apparently, that since proof of the offense of manufacturing necessarily established also, in the particular cases, the offense of possessing distillery apparatus or of

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[16] *Patrilo* v. *United States*, 7 F. 2d 804 (C. C. A. 8); *Tritico* v. *United States*, 4 F. 2d 664, 665 (C. C. A. 5); *Morgan* v. *United States*, 294 Fed. 82, 84 (C. C. A. 4); *Reynolds* v. *United States*, 280 Fed. 1 (C. C. A. 6), modified as to another point, 282 Fed. 256.

Neither *Murphy* v. *United States*, 285 Fed. 801 (C. C. A. 7), nor *Stevens* v. *McClaughry*, 207 Fed. 18 (C. C. A. 8), cited by the court below (R. 20), involved analogous problems. The *Murphy* case was concerned with the splitting of a single conspiracy (p. 817). The *Stevens* case is an early decision (1913) rendered prior to the clarification of the pertinent principles afforded by numerous later decisions of this Court. If sound, it involved the problem whether but one offense was committed by a single act simultaneously offending against two closely integrated statutory provisions; it was not concerned with successive steps contributing to the accomplishment of an over-all evil Congress sought to prevent, as here. As to *Cain* v. *United States*, 19 F. 2d 472 (C. C. A. 8), from which the court below quotes (R. 19), see the analogous case of *King* v. *United States*, 31 F. 2d 17, 19, in which the Circuit Court of Appeals for the Ninth Circuit expresses its disagreement with the conclusion in the *Cain* case, citing the *Albrecht* decision. The *King* case, as indicated (footnote 13, *supra*, p. 22) was affirmed, *per curiam*, by this Court on the authority of the *Albrecht* case (280 U. S. 521).

possessing liquor,[17] the latter offenses were embodied or included in the offense of manufacture and therefore it would be double punishment to separately sentence for these offenses. Rightly understood, these decisions are, we submit, perversions of the "included offense" doctrine. They were all decided prior to the decision of this Court in the *Albrecht* case on January 3, 1927, where, in connection with the National Prohibition Act, this Court reemphasized the principle which, at least, was implicit in some of its prior decisions,[18] that, as has been indicated, the Constitution does not prevent "Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit * * *" (273 U. S. at 11).

The cases are, we believe, inconsistent with the *Albrecht* decision because the courts which decided them failed, through disregard of the principle stated, to give any consideration to the problem whether Congress meant to punish each of the so-called "included" offenses as separate steps leading to the consummation of an evil as to which it could

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[17] The factual situation in the *Patrilo* and *Tritico* cases was that on a particular day Government agents raided a place in which they found an illicit still in operation. This would seem also to have been the situation in the *Reynolds* and *Morgan* cases.

[18] Particularly *Burton* v. *United States*, 202 U. S. 344, 377.

impose penal sanctions and because, if those courts had given consideration to the principle of the *Albrecht* case, they could, we believe, have reached no other result in connection with the punishability of the Prohibition Act offenses involved than this Court reached in respect of the Albrecht's Prohibition Act offenses. It may also be pointed out that there was in the *Albrecht* case no more evidence of duration of possession of the liquor involved than there was in respect of the liquor with which the cases relied upon below was concerned.[19]

Moreover, while we do not regard the difference as controlling, there is, at least, this factual difference between the instant case and the liquor cases cited by the circuit court of appeals. In the instant case the second count charged, and the respondent admitted by his plea of guilty, a possession which continued for some time after the act of manufacture. The charge was that on or about August 25, 1934, the day of manufacture, "and thereafter" respondent possessed the plate. There was, of course, no similar charge of posses-

[19] The evidence in the Albrecht case was that on particular days informers went into the Albrecht's establishment and purchased liquor (R. 26–38, No. 9, October Term, 1926). On the basis of this evidence a separate count of possession and a separate count of sale was framed as to each sale (R. 1–5).

sion in relation to manufacture in the liquor cases. Cf. footnote 17, *supra*, p. 26.[20]

The "included offense" doctrine, properly applied,[21] does have an important place in relation to the double-jeopardy protection in so far as it serves to prevent a second trial or double punishment for a crime which is, essentially, merely an ingredient or an incident or part of another crime. This is illustrated by such decisions of this Court as those in *Grafton* v. *United States*, 206 U. S. 333, and *Hans Nielsen, Petitioner*, 131 U. S. 176. In the *Grafton* case this Court held that a soldier who had been acquitted of homicide by a court-martial could not be tried in a civil court in the Philip-

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[20] This distinction is, of course, without significance if, as we submit, Congress intended to make possesion of distilling apparatus and liquor offenses independent of manufacture, just as it likewise intended, we contend, in connection with the manufacture and possession of bogus plates. In that aspect it cannot matter that the possession was of little or longer duration. Our argument would be the same if, for example, the officers had arrested respondent immediately after the engraver made the plate and turned it over to him, provided, of course, it could be shown that he possessed the plate with intent to use it for counterfeiting. Cf. *United States ex rel. Simkoff* v. *Mulligan*, 67 F. 2d 321, 323 (C. C. A. 2). The court below also regarded the duration of the possession as of no real significance, for it states in its opinion that it accepted the argument of respondent that the offense of possession was "not augmented because it [possession] may continue for more than a day." (R. 18).

[21] See the observations of Mr. Justice Rutledge in the *Buckley* case, *supra* (128 F. 2d at 21–22).

pines for assassination (murder) since the former offense was included in the latter, and if he were not guilty of manslaughter he could not be guilty of manslaughter under circumstances of aggravation enlarging it into murder. And in the *Nielsen* case this Court ruled that a defendant could not be convicted of unlawful cohabitation and thereafter be also convicted for an act of adultery committed during the cohabitation, since the adultery "was an incident and part of the unlawful cohabitation" (pp. 186–187).[22] But the "included offense" doctrine can certainly have no application where, as here, the second crime is not at all part and parcel of the first crime, but relates to an entirely distinct and independent evil, the second crime not coming into being until the completion of the first.

We do not, of course, contend that just because offenses substantially identical are couched in dif-

[22] This Court in its opinion quotes from authorities giving other illustrations of the same principles. 131 U. S. at 187–190. See, also, e. g., *United States* v. *Wilson*, 7 Pet. 150, 160; *Diaz* v. *United States*, 223 U. S. 442, 449, where the Court stated that all that could be claimed by an accused who had been convicted of assault and battery and later, when the assaulted person died, was tried for homicide, was that the jeopardy on the assault and battery charge "protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done" under a Philippine statute.

ferent language or there are other insignificant differences between them, the double-jeopardy barrier is hurdled. As Mr. Justice Rutledge pointed out in the *Buckley* case (128 F. 2d at 21), "in some instances legislative refinement has defined generically indentical offenses with narrow differences in intent or in the means or methods of perpetration, e. g., assault with various specific intents and with variously specified weapons. Some of these differences are substantial, others too slender for, in effect, nullifying the constitutional protection against double jeopardy." Cf. *Crain* v. *United States*, 162 U. S. 625, 636. Even if there be room for a difference of opinion as to individual cases, the decisions of this Court, as a whole, disclose that the criterion which has guided it in the application of the double-jeopardy principle, is whether the difference between the offenses is merely formal or substantial. Compare the group of decisions cited at pp. 22–24, *supra*, with such decisions as the *Grafton* and *Nielsen* decisions, *supra*; *United States* v. *Nickerson*, 17 How. 204, holding that a second charge of perjury would not lie where the defendant was acquitted of a prior perjury charge in which the evidence necessary to sustain the second perjurious act might have been given; *In re Snow*, 120 U. S. 274, deciding that the continuing crime of unlawful cohabitation could not

be carved into several periods for the purpose of maintaining separate prosecutions and increasing the punishment; and *United States* v. *Adams*, 281 U. S. 202, 204, holding that two entries on a bank's books referring to the same transaction, based upon the same draft and which were the correlated means of accomplishing a single fraud, were not independently punishable as separate offenses.

The instant case, clearly, does not fall within any of the categories in which this Court has held the double-jeopardy clause a barrier to another prosecution. The evil at which the statutory provision involved in the first count was directed is solely the making or causing to be made of a plate adapted for counterfeiting Government obligations, regardless of the purpose for which it is actually made or into whose possession it may come. The evil at which the statutory provision involved in the second count was aimed is solely a specialized type of possession of a bogus plate after it is made and after the offense of manufacturing has been consummated, a possession with the specific intent to use the plate for counterfeiting.

CONCLUSION

For the reasons indicated, we respectfully submit that the judgment of the circuit court of

appeals should be reversed and that of the district court affirmed.[23]

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APRIL 1947.

[23] While respondent's sentence was severe, the maximum punishment of 15 years' imprisonment and a fine of $5,000 being imposed on each count, the trial judge undoubtedly took into consideration the fact, of which presumably he had knowledge, that respondent's crimes resulted from his forcing an engraver at the point of a gun to make the plate, and that by pleading guilty to the federal indictment it was likely that he would escape service, in part at least, of the 35-year sentence for forgery imposed by the Wisconsin state court. It turned out that he only served four years of that sentence. See footnote 1, *supra*, p. 6. There may also have been other factors which motivated the severity of the sentence, a matter which was, of course, within the discretion of the trial judge.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 793

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ELLIOTT W. MICHENER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and constitutional provision involved	2
Statement	4
Specification of errors urged by government	6
Summary of argument	7
Argument:	
The sentence under the second count of the indictment is void for the reason that it inflicts a second punishment for an offense included in the first count, in violation of the Fifth Amendment to the Constitution	7
I. This Court has established certain well defined tests for determination of questions involving double punishment. Under these tests, a conviction upon one count on an indictment will bar a conviction and sentence upon another when the evidence required to support a conviction upon one of them would have been sufficient to sustain a conviction upon the other	8
II. In order to prove the offense of unlawfully making a plate, the Government is required to present evidence that will sustain a conviction for the possession of that plate with the specified intent	9
1. Proof that respondent unlawfully made the plate, at a certain time and place (count one) proves that respondent had possession, custody or control of the same plate at the same time and place (count two)	11

Page

2. Proof that respondent unlawfully made the plate (count one) is convincing evidence (sufficient to sustain a conviction) of intent to use the plate to counterfeit government obligation (count two) 12
3. The decision of the court below is not in conflict with *Albrecht* v. *United States*, 273 U. S. 1 ... 15
4. The decision of the court below is supported by the weight of authority and is in conflict only with opinions of the Ninth Circuit Court of Appeals 17

Answer to Government's Argument 19
Conclusion 26
Appendix 27

CITATIONS

Cases:

Albrecht v. *United States*, 273 U. S. 1 ..... 7, 8, 15
Baender v. *Barnett*, 255 U. S. 224 10
Blockburger v. *United States*, 284 U. S. 299 ..... 8, 9, 15
Bozza v. *United States*, 91 L. Ed. 579 ..... 12, 13
Cain v. *United States*, 19 F. 2d 472 (C. C. A. 8) 18, 24
Colbeck v. *United States*, 10 F. 2d 401 (C. C. A. 7) 29
Costner v. *United States*, 139 F. 2d 429 (C. C. A. 4) 23, 24
Crain v. *United States*, 162 U. S. 625 ..... 10, 31
Davis v. *United States*, 12 F. 2d 253 (C. C. A. 5) 29
DiPreta v. *United States*, 270 F. 73 (C. C. A. 2) 29
District of Columbia v. *Buckley*, 128 F. 2d 17 (U. S. C. A. D. C.) 8, 9, 32
Goetz v. *United States*, 39 F. 2d 903 (C. C. A. 5) 12, 16, 18
Holiday v. *Johnson*, 313 U. S. 342 5
Jin Fuey Moy v. *United States*, 254 U. S. 189 29
King v. *United States*, 31 F. 2d 17 (C. C. A. 9), 280 U. S. 521 24
McMurtry v. *United States*, 139 F. 2d 482 (C. C. A. 5) 17

Page

Manning v. *United States*, 275 F. 29 (C. C. A. 8) 29
Matthews v. *Swope*, 111 F. 2d 697 ..... 8, 18
Michener v. *Johnson*, 141 F. 2d 171 ..... 4, 8, 18, 30
Minella et al. v. *United States*, 44 F. 2d 48 (C. C. A. 8) 27, 31, 32
Morey v. *Commonwealth*, 108 Mass. 43 8
Morgan v. *United States*, 294 Fed. 82 (C. C. A. 4) 12, 16, 18
Morgan v. *United States*, 149 F. 2d 185, 187 (C. C. A. 5) 27
Nielsen, Hans, Petitioner, 131 U. S. 176 ..... 11, 19, 22, 24
Patrilo v. *United States*, 7 F. 2d 804 (C. C. A. 8) 12, 16, 18
Pinkerton v. *United States*, 328 U. S. 640 27
Power v. *Squier*, 130 F. 2d 868 ..... 8, 18
Rappy v. *United States*, 157 F. 2d 964 (C. C. A. 2) 30
Reger v. *Hudspeth*, 103 F. 2d 825 (C. C. A. 10) 17
Reynolds v. *United States*, 280 Fed. 1 (C. C. A. 6) 16, 18
Rooney v. *United States*, 203 F. 928 (C. C. A. 9) 29
Ross v. *Hudspeth*, 108 F. 2d 628 (C. C. A. 10) 17
Ruthenberg v. *United States*, 245 U. S. 480 29
Rutkowski v. *United States*, 149 F. 2d 481 (C. C. A. 6) 23
Snow, In re, 120 U. S. 274 ..... 11, 21, 22
Schroeder v. *United States*, 7 F. 2d 60 (C. C. A. 2) 18
Tritico v. *United States*, 4 F. 2d 664 (C. C. A. 5) 12, 16, 18
United States v. *DeNormand et al.*, 149 F. 2d 622 (C. C. A. 2) 28
United States v. *Gooding*, 12 Wheat (U. S.) 459 28
United States v. *Kirby*, 7 Wall (U. S.) 482 10
United States v. *Raynor*, 302 U. S. 540 32
United States v. *Reginelli*, 133 F. 2d 595 (C. C. A. 3) 12
United States ex rel. Simkoff v. *Mulligan*, 67 F. 2d 321 (C. C. A. 2) 17
Vane v. *United States*, 254 F. 32 (C. C. A. 9) 29
Wells v. *United States*, 318 U. S. 257 30
Wolpa v. *United States*, 86 F. 2d 35 (C. C. A. 8) 10, 31

Constitution of the United States:

Fifth Amendment 7

Statutes:

Criminal Code: Page

Section 150 (18 U. S. C. 264) 2, 12, 25
Section 332 (18 U. S. C. 550) 29
Section 151 (18 U. S. C. 265) 23
Section 314 (18 U. S. C. 514) 20
Section 316 (18 U. S. C. 516) 20

Miscellaneous:

Federal Rules of Criminal Procedure: Rule 35 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 793

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ELLIOTT W. MICHENER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

Opinion Below

The opinion of the Circuit Court of Appeals is reported at 157 F. (2d) 616.

Jurisdiction

The judgment of the circuit court of appeals was entered October 23, 1946 (R. 23). On November 19, 1946, by order of Mr. Justice Rutledge, the Government's time for filing a petition for a writ of certiorari was extended to December 22, 1946 (R. 25). The petition was filed December 17, 1946,

and was granted January 20, 1947, the case being transferred to the summary docket (R. 26). The jurisdiction of this Court is conferred by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

Question Presented

Whether a defendant may be given consecutive sentences upon an indictment under Section 150 of the Criminal Code (18 U. S. C. 264) which charged, in the first count, that he caused a plate adapted for counterfeiting Government obligations to be made on or about August 5, 1934, and, in the second count, that he possessed the same plate on or about that date and thereafter with intent to use it in counterfeiting such obligations.

Statute and Constitutional Provision Involved

Section 150 of the Criminal Code (18 U. S. C. 264) provides:

> Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, shall use such plate, stone, or other thing, or any part thereof, or knowingly suffer the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or *whoever by any way, art, or means shall make or execute, or cause, or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security;* or whoever shall sell any such plate, stone, or other thing,

or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; *or whoever shall have in his control, custod , or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof;* or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or whoever shall print, photograph, or in any other manner make or execute, or cause to be printed, photographed, made, or executed, or shall aid in printing, photographing, making or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or shall sell any such engraving, photograph, print, or impression, except to the United States, or shall bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such engraving, photograph, print or impression, except by direction of some proper officer of the United States; or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall

be fined not more than $5,000, or imprisoned not more than fifteen years, or both. (Italics added.)

The Fifth Amendment provides:

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

Statement

The Government's statement of the case is full, fair and accurate, and the following brief statement of the facts is made only for convenience.

The respondent was indicted in the United States District Court of Minnesota in 1935, for causing and procuring the unlawful manufacture of a counterfeit plate [1] and for possessing the same plate on the same day, with intent that the plate be used for counterfeiting (R. 1, 2).[2] The respondent, without benefit of counsel (*Michener* v. *Johnston*, 141 F. (2d) 171 (C. C. A. 9)), pleaded guilty to both

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[1] In the Government's brief in support of its Petition for Certiorari the point was made that respondent as one who procured and caused the manufacture was not a maker and was in a different and worse position to assert his Constitutional protection against double jeopardy than a maker. The point has apparently been dropped along with a contention made by the Government in the court below that certain minute differences in the description of the genuine plates with which the counterfeit plate was compared created two distinct offenses. By the dropping of such arguments the Government has clarified the basic issue and for the sake of simplicity the respondent will be referred to in this brief as the manufacturer and not the causer and procurer of manufacture. A summary of the argument and authorities that would have been included in the body of this brief in answer to the abandoned contentions is contained in Appendix to the brief.

[2] The Government concedes that "it is a fair inference from the indictment that the plate passed immediately into the possession of respondent after it was finished and that there was no intervening possession; indeed, in the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Michener* v. *Johnston*, 141 F. 2d 171 at 174, it is stated that the record in that case 'intimates that respondent compelled an engraver, at the point of a pistol, to make the plate.'" (Government brief, footnote 6, p. 13.)

counts of the indictment and received the maximum sentence that could have been imposed on such indictment, namely, 15 years in a Federal Penitentiary and $5,000.00 fine on each of the two counts, the prison sentences to run consecutively.

In 1941 he filed a petition for a writ of habeas corpus in the District Court for the Northern District of California, in which he contended that his entire sentence was void because at the time of arraignment he was denied benefit of counsel. Apparently, he also made some contention at that time that the sentence on the second count of the indictment was void. Even if such contention had been considered correct respondent would not have been entitled to his liberty at that time because he was still serving the sentence validly imposed under the first count. However, in affirming denial of the petition, the Ninth Circuit Court took occasion in dictum to approve the sentence on the second count and to restate the erroneous rule of its earlier decisions hereafter discussed.

Following his unsuccessful attempt to secure his liberty in the Northern District of California, respondent filed a motion in the convicting court (United States District Court for the District of Minnesota) to have the sentence imposed on count two vacated (R. 3).[3] Respondent's motion was denied, (R. 10) and he appealed to the Circuit Court of Appeals for the Eighth Circuit (R. 11). Respondent submitted a brief, written by himself, to the Circuit Court (R. 15, 16). The case was argued for the Government by an Assistant United States Attorney, and no appearance was made for respondent (R. 16). The Eighth Circuit Court of Appeals reversed the order of the District Court and re-

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[3] See *Holiday* v. *Johnson*, 313 U. S. 342, 349. Rule 35 of the Federal Rules of Criminal Procedure provides that "the court may correct an illegal sentence at any time."

manded the cause with directions to vacate judgment in respect to the second count (R. 23).

The opinion of the Eighth Circuit, 157 F. 2d 616, is lucid and persuasive. The Court concluded that one who manufactures a plate, unlawfully possesses it at the moment of manufacture, and that the intent that it be used in counterfeiting is inferable and, in fact, almost conclusively proved by the fact that the possession arose from an unlawful manufacture. The Court held that possession is a continuing offense, not divisible for purposes of charging separate crimes, and that it is complete at the first instant of possession, which instant coincides with the instant when the crime of manufacture is complete. The Court used the universally recognized evidence test in determining that double jeopardy was involved in the sentence on the second count.

Specification of Errors Urged by the Government

The Government urges that the Circuit Court of Appeals erred:

(1) "In holding that on the facts appearing in the indictment, respondent could not be given consecutive sentences for the offenses of causing to be made a plate adapted for counterfeiting government obligations and of thereafter possessing the plate with the specific intent to use it for counterfeiting such obligations."

> (Such specification of error neglects to state that the crime of possession was alleged to have been committed at the same date and place as the crime of unlawful manufacture (See footnote 2, p. 4).)

(2) "Directing that the sentence on count two be vacated."

Summary of Argument

The sentence under the second count of the indictment is void for the reason that it inflicts a second punishment for an offense included in the first count, in violation of the Fifth Amendment to the Constitution.

I. This Court has established certain well-defined tests for determination of questions involving double punishment. Under these tests, a conviction upon one count of an indictment will bar a conviction and sentence upon another when the evidence required to support a conviction upon one of them would have been sufficient to sustain a conviction upon the other.

II. In order to prove the offense of unlawfully making a plate (count one), the Government is required to present evidence that will sustain a conviction for the possession of that plate with the specified intent.

1. Proof that respondent unlawfully made the plate, at a certain time and place (count one) proves that respondent had possession, custody or control of the same plate at the same time and place (count two).

2. Proof that respondent unlawfully made the plate (count one) is convincing evidence (sufficient to sustain a conviction) of intent to use the plate to counterfeit government obligations (count two).

3. The decision of the court below is not in conflict with *Albrecht* v. *United States*, 273 U. S. 1.

4. The decision of the court below is supported by the weight of authority and is in conflict only with opinions of the Ninth Circuit Court of Appeals.

Argument

I. *Under established and well-defined tests a conviction upon one count of an indictment will bar a conviction and sentence upon another when the evidence required to support a conviction upon one of them would have been sufficient to sustain a conviction upon the other.*

This Court and the Circuit Courts have been most liberal in upholding statutes and the Government's construction of statutes against pleas of double jeopardy. The Government has cited a multitude of cases where steps in crimes have been separately punished [4] and where the same act has been punished twice where it was violative of two statutes,[5] but, except for the erroneous decisions of the Ninth Circuit Court,[6] we have been referred to no case (and we have found none) upholding sentence on an "included offense" where every essential element of such offense has been proved in supporting a conviction on another offense.

The area of protection given by the double jeopardy clause has been severely restricted, but under the facts of this case respondent is still protected, by "the same or different evidence test." [7]

The statement of "the same or different evidence test" in *Morey* v. *Commonwealth*, 108 Mass. 433 has been quoted with approval in many state and federal cases. The following quotation from the case is taken from *Gavieres* v. *United States*, 220 U. S. 340, 342:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon an-

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[4] *Albrecht* v. *United States*, 273 U. S. 1, and companion cases.

[5] *Blockburger* v. *United States*, 284 U. S. 299, and companion cases.

[6] *Matthews* v. *Swope*, 111 F. 2d 697.
Power v. *Squier*, 130 F. 2d 868.
Michener v. *Johnston*, 141 F. 2d 171 (dictum).

[7] *District of Columbia* v. *Buckley*, 128 F. 2d 17 (U. S. C. A. D. C.), cert. den. 317 U. S. 658, and *Blockburger* v. *United States*, *supra*, footnote 5.

other, *unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.* The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis supplied.)

The Constitution forbids Congress or the Courts from twice putting a man in jeopardy for the same offense and this Court has held that the evidence test quoted above determines the question of double jeopardy.[8]

II. *In order to prove the offense of unlawfully making a plate (Count One), the Government is required to present evidence that will sustain a conviction for the possession of that plate with the specified intent.*

The first count of the indictment requires proof that the respondent willingly and knowingly [9] manufactured a plate adapted to the counterfeiting of Government obligations without lawful authority.[9]

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[8] *Blockburger* v. *United States*, 284 U. S. 299. Mr. Justice Rutledge in his concurring opinion in *Buckley* v. *District of Columbia*, 128 F. 2d 17, cert. den. 317 U. S. 658, points out a necessary qualification to the test so that over-refinements in designations of crimes which would technically permit two or more prosecutions for the same offense are to be disregarded by the Courts if the constitutional protection is to have substance.

[9] The Government states that the simple manufacture of a plate would sustain a conviction on count 1. It is true that the statute so reads, but judicial interpretation must supply exceptions or we would reach the absurd conclusion that an honest Government engraver performing the work for which he was paid by the Government could be sent to jail for 15 years or the equally absurd conclusion that a man who made a plate by mistake (admittedly a remote possibility) or under duress, as in the

The respondent's plea of guilty to the charge that he unlawfully manufactured the plate described in the first count of the indictment establishes then:

> **That he made a plate adapted for counterfeiting Government obligations and that he made it willingly, knowingly and without lawful authority.**

To establish the second count the Government would be required to present convincing evidence that respondent had *possession, custody, or control*[10] of the same plate *with intent* to counterfeit Government obligations.

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case of the engraver here (Government brief, footnote 6, p. 13), could be similarly sentenced. The exception in favor of the Government engraver is supported by *United States* v. *Kirby*, 7 Wall (U. S.) 482,

> "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.
>
> "The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'That whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the Statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction or retarding of the passage of the mail or its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

and that in favor of the unwitting manufacturer by *Baender* v. *Barnett*, 255 U. S. 224.

It is therefore apparent that when the Government charged the respondent with "unlawfully" manufacturing a plate, the word unlawfully was not surplusage but a necessary allegation negativing the exceptions that must be read into the statute.

[10] Where the statute denounces acts in the disjunctive, the pleader may charge in the conjunctive (as was done in this case (R. 2)) and proof of any of the acts will support a verdict of guilty. *Crain* v. *United States*, 162 U. S. 625, *Wolpa* v. *United States*, 86 F. 2d 35 (C. C. A. 8), cert. den. 299 U. S. 611.

1. *Proof of manufacture proves possession, custody or control of the article manufactured.*

Respondent believes that the manufacturer of a plate must have possession, custody or control of the plate, and the Government does not now deny that such is the result of manufacture. In its brief in support of its Petition for Certiorari (p. 12) the Government conceded that there is a "possession incident to the manufacture of the plate" and argued that such was not the type of possession denounced in count 2 of the indictment. The untenable point has apparently been dropped.

An equally untenable argument has been substituted, namely, that the continuing offense of possession must have "duration." The argument seems to be that, although respondent possessed the plate at the moment that manufacture was complete, such possession didn't count. The cases of *Hans Nielsen, Petitioner*, 131 U.S. 176, and *In re Snow*, 120 U.S. 274, have rejected similar arguments.

Respondent submits that in order to make a plate the manufacturer must have control over or possession of the raw materials required for manufacture and must be considered to exercise control over the process of manufacture. The control is continuous and he controls or possesses the finished product.

Consequently, at no point, however finely drawn, can it be said: That at this instant the maker had no possession or control, or at this instant the manufacture of a plate is complete but possession has not begun. In the same instant that the crime of manufacture is complete, the crime of possession is complete, and *the evidence that proves manufacture proves possession.*

It has been held repeatedly in cases arising under the National Prohibition Act [11] (which the Government seeks to have disapproved (Government's brief, pps. 24-26)) that,

> "A defendant who is convicted of the manufacture of liquor cannot upon the same evidence also be convicted of possession of the liquor *thereby brought into existence . . .*" (Emphasis supplied.) *Goetz* v. *United States*, 39 F. 2d 903 (C.C.A. 5) 1930.

2. *Proof of unlawful manufacture of a counterfeit plate is convincing evidence (sufficient to sustain a conviction) of intent to use the plate to counterfeit government obligations.*[12]

Thus far, respondent has demonstrated that at the instant he became guilty of the crime of manufacturing a plate, he had possession, custody, or control of the same plate. The intent which respondent had at the instant manufacture was complete, was an intent common to both crimes. Jurymen could properly ask themselves, "Why did the respondent make the counterfeit plate?", and properly decide that he made it to counterfeit government obligations.

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[11] *Morgan* v. *United States*, 294 Fed. 82 (C. C. A. 4).
Tritico v. *United States*, 4 F. 2d 664 (C. C. A. 5).
Patrilo v. *United States*, 7 F. 2d 804 (C. C. A. 8).
Goetz v. *United States*, 39 F. 2d 903 (C. C. A. 5) (decided *after* the Albrecht case. See Government's brief, p. 26).

[12] The Government states in its brief (P. 27) that it does not consider the additional element of intent required to be proved by the fourth clause of Section 150 of the Criminal Code (18 U. S. C. 264) a "controlling difference" between this case and the liquor cases (see footnote 21, p. 28) where intent was not an element of the offense of possession. Respondent will gladly accept such concession but believes that there must be some evidence of intent, which however, is properly supplied by inference. *Bozza* v. *United States*, 91 L. Ed. 579; see also *United States* v. *Reginelli*, 133 F. 2d 595, 598 (C. C. A. 3), cert. den. 318 U. S. 783.

> "That the intent, motive, or purpose necessary for the establishment of a crime may rest in inference hardly requires citation of authority."

Respondent adopts the analysis of the court below (R. 21) as a full and accurate statement of the law.

> "We must therefore consider whether the conceded facts involved in the offense charged in Count one were sufficient to show that appellant's possession was with intent to use the plate for counterfeiting. Intent is a mental condition, invisible to human eyes, and is rarely susceptible of direct proof. The criminal does not ordinarily proclaim or announce in advance his intention to commit a crime. Intent, like any other fact, may be proved by circumstantial evidence (*Majestic Securities Corp.* v. *Commissioner*, 8 Cir., 120 F. 2d 12; *State* v. *Gardner*, Mont. 249 P. 574; 20 Am. Juris. Sec. 340), and ordinarily must be implied from the proven facts and circumstances, including the actions of the person whose intent is in question. It is inferable whenever the means used are such as would ordinarily result in the commission of the forbidden act. This is too elementary to warrant the citation of authorities. Proof of the possession of this plate by one had who unlawfully produced it, in connection with the character of the plate, was, unexplained, not only prima facie proof of criminal intent, but convincing evidence of it. As has been observed, the act of making this plate was an unlawful act, and it came into possession of the appellant by reason of this unlawful act. Evidence of the unlawful making and the resulting possession was competent proof going to the question of intent. The possession resulted from the committing of the crime described in the first count. The plate on its face disclosed its purpose, and the facts were ample to sustain proof of the allegation that appellant's possession was for the purpose of counterfeiting. It is scarcely conceivable that any other or additional facts could have been adduced in support of that allegation."

In *Bozza* v. *United States*, 91 L. Ed. 579,[13] Mr. Justice Black, speaking for the Court held that evidence which es-

[13] Decided February 17, 1947, Case No. 190 of this term.

tablished that the petitioner had aided and abetted the clandestine manufacture of liquor was sufficient to support the inference drawn therefrom by the jury that he had carried on "the business of a distiller . . . with intent willfully to defraud the . . . United States of the tax on . . . spirits so distilled". He used the following apt and colorful language to support his opinion:

> "Men in the jury box, like men in the street, can conclude that a person who actively helps to operate a secret distillery knows that he is helping to violate Government revenue laws. That is a well known object of an illicit distillery. Doubtless few who ever worked in such a place, or even heard about one, would fail to understand the cry: 'The Revenuers are coming!' "[14]

In the light of this Court's conclusion that an intent to defraud the government of liquor taxes may be proved by a showing that petitioner had abetted the carrying on of an illicit distillery, respondent feels confident in urging that unlawful manufacture of a plate establishes an intent to use the plate for counterfeiting.

The point that, to establish a violation of count one, the Government was *required* to prove that respondent made the counterfeit plate willingly, knowingly and without lawful authority has been covered previously.[15] It is respondent's contention that such proof of unlawful manufacture *requires* proof of facts which establish, as the only credible

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[14] The dissenting opinion in the *Bozza* case emphasizes that the only evidence adduced to show that petitioner had the required intent showed that he aided and abetted in the illicit manufacture of liquor and states:

> ". . . evidence is necessary which shows that by some act of concealment he promoted the fraud, or by counsel and advice furthered the unlawful scheme, or in fact had some interest in the project."

Respondent's plea of guilty to the first count establishes that he was a principal in the unlawful manufacture of a counterfeit plate. There could hardly be more convincing evidence that he "furthered the unlawful scheme or . . . had an interest in the project."

[15] See footnote 9 page 9.

inference, respondent's intent to use the plate to counterfeit government obligations.[16]

3. *The decision of the court below is not in conflict with Albrecht v. United States, 273 U. S. 1.*

The government relies principally on the *Albrecht* case for reversal. In that case, this Court held that there was no double jeopardy in punishment for possession of illegal liquor and for its subsequent sale. The relevant portion of the opinion follows:[17]

> "possessing and selling are distinct offenses. *One may obviously possess without selling;* and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and *later* sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offence. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction. *The precise question does not appear to have been discussed in either this or a lower federal court in connection with the National Prohibition Act;* but the general principle is well established" (Italics supplied).

The government argues that the "liquor" cases which held that a man could not be sentenced for possessing liquor after being sentenced for manufacturing the same liquor, were decided before the *Albrecht* case and that the rule of law stated in the *Albrecht* case, if applied to such

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[16] The case thus falls within the most literal and technical application of the test announced in *Blockburger* v. *United States*, 284 U. S. 299, 303, 304:

> "The test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

[17] 273 U. S. 1, 11.

cases, would have resulted in a holding of no double jeopardy. In the light of Mr. Justice Brandeis' well-established reputation for thoroughness in research, it appears much more likely that he read *Reynolds* v. *United States*, 280 F. 1 (C. C. A. 6), *Morgan* v *United States*, 294 F. 82 (C. C. A. 4), *Tritico* v. *United States*, 4 F. 2d 664 (C. C. A. 5) and *Patrilo* v. *United States*, 7 F. 2d 804 (C. C. A. 8), concluded that the "precise question" involved in the *Albrecht* case had not been "discussed in . . . a lower Federal court in connection with the National Prohibition Act". Respondent believes that if he had disapproved of such cases he would have said so.

It should also be noted that *Goetz* v. *United States*, 39 F. 2d 903 (C. C. A. 5), another of the "liquor cases", was decided in 1930 after the *Albrecht* decision.

The statement in the *Albrecht* opinion "one may obviously possess without selling" illustrates the fundamental difference between the facts in the *Albrecht* case and the facts in the case at bar, and indicates why Mr. Justice Brandeis did not consider the "liquor cases" applicable. One may obviously possess illegal liquor and be guilty of that offense, although he intends to drink it or give it away. If he changes his mind, and later sells the liquor, he has committed another offense provable by different evidence. Albrecht committed one offense of possessing liquor—an offense complete and punishable at the instant of possession —and subsequently another offense, that of selling the liquor.

Respondent, on the other hand, did not merely make a plate and afterward control or possess it. He controlled or possessed it *while* and *as* it was being made, and the crime of manufacture could not be complete until he possessed it. Briefly: in the *Albrecht* case, one crime was committed; subsequently, another. In the case at bar, *no* crime was committed until the instant when *both* were committed by

the same act. Until respondent had possession of the plate, there *was* no plate for the manufacture of which he could be punished.

The *Albrecht* case holds in effect that one may possess liquor for an instant before sale, and thereby be guilty of the crime of possession. The holding is entirely consistent with respondent's theory that at the instant when manufacture and possession coincided, the first instant of possession, the crime of possession was complete.

What has been said of the *Albrecht* case is equally applicable to the other possession and sale cases cited by the government.[18]

They are no more in conflict with the decision of the court below than is the *Albrecht* case. In all, consecutive sentences were sustained for the possession and selling, or for the possession and passing of counterfeit or altered money. They are clearly distinguishable from the instant case, for in each of them, as in the *Albrecht* case, the offense of possession was necessarily accomplished and complete *before* any sale or passing was attempted, and *need not have resulted in any such sale or passing.*

4. *The decision of the court below is supported by the weight of authority and is in conflict only with opinions of the Ninth Circuit Court of Appeals.*

There is a clear conflict in decisions of the Circuits which will be resolved by the Court's decision in this case.

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[18] *United States ex rel. Simkoff* v. *Mulligan*, 67 F. 2d 321 (C. C. A. 2), in which consecutive sentences were sustained for possessing and selling the same counterfeit note. See also *Ross* v. *Hudspeth*, 108 F. 2d 628 (C. C. A. 10); *McMurtry* v. *United States*, 139 F. 2d 482 (C. C. A. 5), certiorari denied, 321 U. S. 783, which involved separate sentences for possessing and passing an altered obligation of the United States; and *Reger* v. *Hudspeth*, 103 F. 2d 825 (C. C. A. 10), certiorari denied, 308 U. S. 549, which involved separate sentences for possessing counterfeit coins and passing them.

The opinion below which the Government asks the Court to reverse is directly supported by decisions of the Fourth Circuit [19] and the Fifth Circuit,[20] and it is further supported by similar opinions involving closely related fact situations by the Second Circuit,[21] the Sixth Circuit,[22] and by two other opinions of the Eighth Circuit.[23]

The government has not cited a case and we have found none (other than from the Ninth Circuit) in conflict with the opinion below.

Respondent submits that the Ninth Circuit has erroneously interpreted the established test of double jeopardy. The error was made in *Matthews* v. *Swope*, 111 F. 2d 697 (C. C. A. 9) and the decision in *Power* v. *Squier*, 130 F. 2d 868 (C. C. A. 9) and the *dictum* in *Michener* v. *Johnston*, 141 F. 2d 171 (C. C. A. 9) rest squarely on its authority.[24] Matthews was convicted and punished for (1) manufacture and (2) possession of the same plate. The court, without any mention of intent and while correctly citing the rule that "there is no double jeopardy . . . if *each* offense requires proof of a fact which the other does not", (italics supplied) arrived at the obvious *non sequitur* that Matthews was properly sentenced on both counts "since the proof necessary to support the first count is *different from and additional to* that required to support the second count" (Italics supplied).

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[19] *Morgan* v. *United States*, 294 Fed. 82.

[20] *Tritico* v. *United States*, 4 F. 2d 664 and *Goetz* v. *United States*, 39 F. 2d 903.

[21] *Schroeder* v. *United States*, 7 F. 2d 60. (Transportation and possession.)

[22] *Reynolds* v. *United States*, 280 Fed. 1. (Manufacture of liquor and possession of manufacturing equipment.)

[23] *Patrilo* v. *United States*, 7 F. 2d 804. (Manufacture of liquor and possession of manufacturing equipment.)

Cain v. *United States*, 19 F. 2d. 472. (Sale of narcotics by mail.)

[24] Both Matthews and Equier represented themselves, and the Ninth Circuit did not have the benefit of briefs by counsel in either case.

The language is plain and the meaning unmistakable. In the phrase *additional to* is a clear admission that proof of the second count was inherent in proof of the first, and that in only one count, the first, was there a new and different element requiring "additional" proof. Such a test could not be used in any case involving "included offenses", for proof of a greater offense must always be different from and additional to the proof required to support the lesser.

Answer to Government Argument

The Government contends that: (1) to combat the evils of counterfeiting, Congress defined seven separate offenses which might be incidents of counterfeiting activities; the clauses defining the offenses are made generally applicable to "whoever" engages in the prescribed activity; since no exceptions are stated in the statute, it must have been the intent of Congress that anyone guilty of any one or more of the offenses should be punished for each. "There is not a word to indicate that violation of one clause absolves an offender from criminal liability for violation of another",[25] and (2) constitutional considerations do not preclude separate punishments for the two offenses.

The answer to such arguments is that Congress, in creating a general statute aimed at counterfeiting activities, must perforce speak in general terms, relying on the courts to construe the statute as particular cases arise. Every statute operates within the framework of the Constitution, and the fact that Congress has not, within the clauses of the statute, excluded those cases wherein double punishment for one offense is involved, is no indication that the statute was intended to operate without such qualification. In *Hans Nielsen, Petitioner,* 131 U. S. 176, for illustration,

[25] Government brief, p. 16.

the offenses of unlawful cohabitation and of adultery were denounced not merely by different clauses but by different statutes,[26] carrying different penalties, and "there is not a word to indicate that violation of one (statute) absolves an offender from criminal responsibility for violation of another"; but this Court held that the evidence necessary to support a conviction for unlawful cohabitation would also support a conviction for adultery, and that separate sentences could not be imposed. The conclusion, it is fair to point out, was arrived at by the application of established tests of double jeopardy and not "intuitively" or upon the "distinct evil" theory.

The fact that Congress has made the statute generally applicable to "whoever" does any of the proscribed acts, does not mean that the statute was designed to be applied literally and without regard to common sense or constitutional rights. For example, the word "whoever" in the clause referring to making plates must be construed to exclude government engravers, employed to make plates. Likewise, it is our contention, that the word "whoever" used in referring to those who may be criminally liable for possessing a plate with the prescribed intent, should be construed so as to preserve the constitutional right of freedom from double punishment. The problem, then is to decide whether this is a case in which double punishment is involved.

As the government has admitted, this case must be decided on the basis of the "composite factual picture presented by both counts of the indictment",[27] and not on a hypothetical state of facts. The bulk of the government's argument on the question of the import of statute, however, ignores this proposition. The government states that,

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[26] Sections 314 and 316 of the Criminal Code (18 U. S. C. 514, 516).

[27] Government brief, footnote 6, p. 13.

"In the fourth clause it (Congress) was dealing with an offense which *succeeds* the manufacture of a plate, an offense which comes into being when the manufacture *ends*, and which might, and probably would, have duration."[28] Two fallacies are involved in the statement, as related to this case. First, the offense of possession in this case did not *succeed* the manufacture of the plate. The indictment charges that "on or about August 25, 1934" the respondent unlawfully made the plate and that "on or about August 25, 1934, and thereafter" he possessed the plate (R. 1). This is to allege that the crime of possession was consummated when he *first* possessed the plate on that date, and not at some particular, arbitrarily chosen, hour or minute after that instant. And he first possessed the plate at the same instant the act of making it became a crime. Secondly, while the offense of possession *might* have duration, it is not an essential element of the offense. Unlawful possession like unlawful cohabitation[29] is an offense not augmented by the fact that it may continue for more than a day, and not subject to arbitrary division into periods of time creating separate offenses.

The government contends that because respondent pleaded guilty to possession of a plate on or about August 25, 1934, "and thereafter", the possession count in this case was based upon a duration of possession not reflected in the liquor cases.[30] The phrase "and thereafter" is not necessary under the statute, adds nothing whatever to the charge contained in count two, and constitutes surplusage. The Government concedes that it "would (not) regard the differences as controlling".[31] But in suggesting such a

[28] Government brief, page 17.

[29] *In re Snow*, 120 U. S. 274.

[30] Government brief, p. 27.

[31] Government brief, p. 27.

construction of the statute, and infliction of separate punishments in this case the Government seems not to recognize its particular argument for what it is—precisely the same theory of punishment it unsuccessfully advocated in *Hans Nielsen, Petitioner*, 131 U. S. 176. In the *Nielsen* case, the Government sought to (1) ignore the element of adultery established by proof of unlawful cohabitation under the first indictment; and then to (2) arbitrarily terminate that continuing offense of unlawful cohabitation as of May 13, 1888, in order that (3) adultery could be charged as a separate offense occurring thereafter, on May 14, 1888.

If there is any difference between the two cases it is only that in the *Nielsen* case the Government charged an end to a continuing offense while it was still in progress while in respondent's case it seeks to fix the *beginning* of a continuing offense at a time (after manufacture) when the evidence already shows the offense to be legally complete and punishable.

"It is to prevent such an application of penal laws," said this Court in *In re Snow*, 120 U. S. 274, 282, 285, "that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purpose of indictment or prosecution, prior to the time the prosecution is instituted . . . there was but one entire offense . . . between the earliest day laid in any indictment and the latest day laid in any."

If "earliest day" is logically interpreted as "earliest moment", then the Court's rulings in the above cases are precisely in point with the respondent's contentions that (1) the offense of possession was proved when it was *first* proved under the charge of manufacture in count one, and (2) this *first* proof of, and conviction for, possession operated as a conviction for the whole period up to the finding of the indictment, and protected respondent from a

second prosecution and punishment for that offense for any part of the whole period.

Finally, if Congress had contemplated or intended a possession having *duration* as the substance of the offense, it could easily have so provided in the statute, as was done in describing the offense of "Uttering Forged Obligations".[32] In that section of the Criminal Code, the wording "keep in possession" was used. It may also be pointed out on a policy level, that it would be unwise to import into the crime of possession any requirement of "duration". Not only would such concept make for uncertainty in definition of the crime, but proving possession for a period of time might be difficult and sometimes impossible.

Throughout its brief, the Government argues that the intent of Congress "to strike at distinct evils" should decide all questions of double jeopardy. Now, Congress "strikes at distinct evils" only by denouncing them in separate statutes, separate clauses, or disjunctively; and presumably it intends to strike at *all* evils so denounced. What the Government is really advocating therefore, is the practical abandonment of all rules and tests of double jeopardy. By the reasoning which the Government uses in its brief, it might be argued that one must assault a mail clerk with the intent to rob him before one can commit the robbery itself, and also that robbery is but a "step" toward the carrying away of the proceeds of the robbery and that one might be separately punished for each of the three "steps" in a single robbery. Yet it is held that robbery is not complete without asporation, *Rutkowski* v. *United States*, 149 F. 2d 481 (C. C. A. 6), and the offense of assault with intent to commit robbery is included in the offense of robbery, *Costner* v. *U. S.*, 139 F. 2d 429 (C. C. A. 4).

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[32] Sec. 151 of the Criminal Code (18 U. S. C. 265).

To summarize: the Government's theory, is that Congress intended cumulative punishments under a statute or statutes aimed at "different evils". The theory cannot apply to cases involving double jeopardy. *Hans Nielsen, Petitioner,* 131 U. S. 176, *Cain* v. *United States,* 19 F. 2d. 472 (C. C. A. 8),[33] *Costner* v. *United States,* 139 F. 2d. 429 (C. C. A. 4).

Respondent submits that Congress did not intend that one in his position should be given a sentence of 30 years.[34]

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[33] The *Cain* case presents a factual situation substantially similar to this case, although theoretically it is not as strong. There the defendant was indicted (1) for unlawfully selling narcotics and (2) for sending narcotics through the mail. At the trial the Government proved that delivery, completing the sale charged in the first count, was accomplished by mail and such mailing constituted the offense charged in the second count. The court held that the two offenses were proved by the evidence required to prove the first count. The court pointed out that the "sale" was not complete until delivery and that at the instant that the narcotics were deposited in the mail both offenses were complete and were proved by the same evidence.

The authority of the *Cain* case was questioned in dictum in *King* v. *United States,* 31 F. (2d) 17 (C. C. A. 9), which case was affirmed in a *per curiam* opinion of this court, 280 U. S. 521, on the authority of the *Albrecht* case. The decision in the *King* case is entirely consistent with established tests, with respondent's theory of double jeopardy *and* with the *Cain* case. There the defendant was indicted for selling narcotics not in or from the original stamped package, he pleaded guilty and was later indicted for sending narcotics in interstate commerce *without having registered and paid a special tax.* The evidence showed that the first indictment required proof of shipment in interstate commerce to establish delivery, but proof to sustain such indictment did not require evidence, and none could have been properly introduced, proving that defendant was not licensed and had not paid the special tax, which are elements of the crime charged in the second indictment which *must* be proved to warrant a conviction. Similarly, evidence showing that the narcotics were not *sold in or from the original stamped package* would not be material or relevant to prove the offense charged in the second indictment. The *King* case points out not a weakness in the *Cain* case but in the theory of double jeopardy held by the Ninth Circuit Court of Appeals.

[34] *Costner* v. *United States,* 139 F. 2d 429, 431 (C. C. A. 4).

> "the idea that . . . Congress intended to authorize two punishments for the same unlawful conduct, that is, ten years for the assault with intent to rob, and ten years for robbery, is too unreasonable to be seriously entertained."

Respondent manufactured a plate for counterfeiting, an offense for which Congress fixed a maximum penalty of 15 years imprisonment. He was sentenced to 15 years for manufacture, plus 15 years for possession of the same plate, a necessary incident of manufacture.

Under the theory of punishment thus exemplified:

Every person who violates Clause Two of Section 150 of the Criminal Code (18 U. S. C., 264) by the manufacture of a plate, automatically and inescapably becomes subject also to sentence for a violation of Clause Four of that section, for possessing the plate with the intent that it shall be used in counterfeiting.

It is a fair question to ask, then: Is it following the intent of Congress to subject *every* maker of a plate to a 30 year sentence, when the statute states that the maximum sentence for a maker shall be 15 years?

To pose the question, is to suggest the answer and the explanation. While the Government argues [35] that it was the intent of Congress to punish the possessor of a plate even if he *had* made it, a more credible explanation would seem to be that what Congress really intended was to punish the possessor of a plate even if he had *not* made it—just as a legislature might intend to punish the receiver of stolen property, even though he had not stolen it. In revising and broadening the counterfeiting statutes, Congress meant simply to reach a class of offenders who had theretofore been immune— the possessors of counterfeiting implements. Having made it an offense to manufacture a plate, Congress saw that counterfeiters might often be apprehended while using, or in possession of, plates long after such manufacture. They should be punished in such circumstances although it might be impossible to prove who made the plates or caused them to be made.

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[35] Government brief, p. 18.

Conclusion

The decision of the Court in this case will clarify the meaning of the constitutional guarantee against double jeopardy, and respondent respectfully submits that the Court should not depart from established tests to accept the confusing concept of "different evils" and weaken protection of an individual under the Constitution.

Respondent respectfully submits that the judgment of the Circuit Court of Appeals should be affirmed.

APPENDIX

Point I

Respondent Who Caused and Procured a (Counterfeit) Plate To Be Made Is Guilty In the Same Manner and to the Same Extent As One Who Personally Makes a Plate; He Has the Same Possession, Custody and Control of the Plate As the Actual Maker.

By dichotomy, the person who actually made the plate at the respondent's behest made it either willingly or unwillingly. If he made it willingly he was an accomplice or principal and both parties were liable for violations of law incident to the undertaking. Whatever possession the actual maker had, was also the possession of respondent. A case precisely in point is *Minnella et al.* v. *United States,* 44 F. 2d 48 (C. C. A. 8), where the court held:

> "As to Rosario, the evidence is also clear. . . . He paid Mays for his services in making the plates. . . . He was an active participant in the entire matter, and the acts of physical possession of Mays and Fidele were the possession of all who were in this common undertaking."

And in *Pinkerton* v. *United States,* 328 U. S. 640, it is said:

> "So long as partnership in crime continues, the partners act for each other in carrying it forward."

It is not necessary, in order to hold the procurer or abettor liable as a principal to prove a conspiracy. In *Morgan* v. *United States,* 149 F. 2d 185, 187 (C. C. A. 5) cert. den. 326 U. S. 731, the court held that:

> "While the evidence introduced in the trial would have been competent to prove conspiracy, we think, as did the court below, that it was also competent to establish that Johnson and Warner were merely employees or agents of appellant or of corporation controlled by him, and that their acts were for and in his behalf. It

> is a *well recognized principle that the act of an agent with the knowledge and consent of the principal is the act of the principal.*"

Thus, if the actual maker was a *willing* worker, the respondent is liable for his acts as a partner in the undertaking. *United States* v. *Gooding*, 12 Wheat. (U. S. 459).

If on the other hand, the actual maker of the plate made it *unwillingly*, under force and compulsion, then both he and the plate were under the immediate control and dominion of respondent. If the maker acted unwillingly and under compulsion he had no legal discretion and his acts were the acts of respondent who became a principal in the first degree. See *United States* v. *Gooding*, 12 Wheat. (U. S.) 459, 468.

Whatever possession such an unwilling maker had, was the possession of respondent. This proposition is amply sustained by *United States* v. *DeNormand, et al.*, 149 F. 2d 622 (C. C. A. 2), a case which this court has considered well.[1]

Appellants held up the drivers of two trucks as the drivers left a lunch room, locked them in the truck terminal and were arrested as they left the terminal. The trucks were parked on a nearby street and appellants never touched either the trucks or their contents.

> "By that act", said the court, "they deprived the carrier of power to exercise control or dominion over the truck, and acquired such power for themselves; thus *whatever possession the carrier or its employee had was transferred to them.* If they did not take actual physical possession they at least took constructive possession."

This case is also a conclusive rejection of the theory that possession must be *actual*. Appellants were convicted solely on proof of constructive possession.

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[1] Forma pauperis granted, certiorari denied 326 U. S. 756; petition for rehearing denied 326 U. S. 808; motion for leave to file second petition for rehearing granted, rehearing denied 326 U. S. 811; motion for leave to file third petition for rehearing denied 327 U. S. 816.

The foregoing arguments demonstrate that one cannot cause the manufacture of a plate by either (1) a willing or (2) an unwilling agent without being guilty in the same manner as the agent and without having the same control, custody or possession of the plate as the actual maker.

But there is a second and more direct method of establishing the point. Under Section 332 of the Criminal Code (18 U. S. C. 550) "Principals" defined:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, *is* a principal" (Italic supplied).

It is established that, by virtue of this statute, an indictment charging one with aiding or procuring the commission of a crime, *charges him as a principal. Ruthenberg* v. *United States*, 245 U. S. 480; *Rooney* v. *United States*, 203 Fed. 928 (C. C. A. 9); *Davis* v. *United States*, 12 F. 2d 253 (C. C. A. 5), cert. den. 271 U. S. 688. And there are also innumerable cases holding that an indictment charging one as a principal will be supported by evidence that he is only an aider, abettor, or procurer of the crime. *Colbeck* v. *United States*, 10 F. 2d 401 (C. C. A. 7), cert. den. 271 U. S. 662. *Jin Fuey Moy* v. *United States*, 254 U. S. 189. *DiPreta* v. *United States*, 270 Fed. 73 (C. C. A. 2). *Vane* v. *United States*, 254 Fed. 32 (C. C. A. 9).

The statute was designed to abolish the distinctions between accessories and principals in crime and, in so far as criminal liability is concerned, to equate the two offenders. Its purpose has been achieved. By virtue of the statute, one who is convicted of causing and procuring the making of a plate is guilty as a maker, and subject to punishment in the same manner. Whatever possession or control of the plate the maker has and whatever criminal liability he may be subjected to . . . the same is shared by the procurer or abettor.

The application of this statute to cases where double jeopardy is involved, is shown in *Manning* v. *United States*, 275 Fed. 29 (C. C. A. 8), where it was held that defendant

who had been acquitted under an indictment charging conspiracy to sell opium, could not be convicted under a second indictment charging a conspiracy to issue prescriptions for opium which his co-conspirator would fill, for, by virtue of the "'Principals' defined" statute, proof of the facts alleged in the second indictment would have been sufficient to sustain a conviction under the first indictment.

The *Manning* case is cited here to show that if a maker could not be prosecuted on the second count of the indictment, respondent as a procurer and causer of making would have the same immunity. The reason for the rule is clear: if a principal is given constitutional protection from double punishment, a participant, who is certainly no *more* guilty than the principal, should have the same protection.

The extent to which this statute is applicable in making an aider or procurer of a crime liable for all the incidents of the crime, is indicated in the recent case of *Rappy* v. *United States*, 157 F. 2d 964 (C. C. A. 2) cert. den. 91 L. Ed. 377. Judge Learned Hand held in effect that Rappy, in aiding and abetting Essig, became automatically guilty of *possessing* stolen property (actually in the possession of Essig) to the same extent as Essig, simply because under the "Principals' defined" statute, he *could* have been indicted and convicted as a principal.

The theoretical soundness of the argument is thus established. There remains the question of whether there are any circumstances in this case which would render the argument inapplicable. Respondent's crime resulted from his forcing an engraver at the point of a gun to make the counterfeit plate.[2] The Ninth Circuit in *Michener* v. *Johnson*, 141 F. 2d 171, implies in a dictum that under such circumstances, respondent need not have had control, custody, or possession of the plate. Their remarks seem completely discredited by the holding in the *DeNormand* case. It is hard to conceive of a situation where a procurer could

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[2] *Michener* v. *Johnson*, 141 F. 2d 171. Respondent's application for a writ of habeas corpus was denied. This court can take judicial notice of such habeas corpus proceedings. *Wells* v. *United States*, 318 U. S. 257. The circumstances of manufacture are mentioned twice in the Government brief, footnotes 6 and 24, pps. 13 and 32.

be more guilty as a principal in the crime of making a plate, than one wherein he used a pistol to insure that his will would be done. If ever a man had control, custody and possession of a plate, in every stage of its manufacture and upon its completion, it was certainly respondent.

One final point may be noted. In count two of the indictment, respondent was charged with possession, custody and control. Since possession, custody and control are denounced disjunctively in the statute, it is necessary to prove only *one* of these in order to convict on count two. *Wolpa* v. *United States*, 86 F. 2d 35 (C. C. A. 8) cert. den. 299 U. S. 611; *Crain* v. *United States*, 162 U. S. 625. Irrespective of whether respondent had possession of the plate while the engraver was being forced to make it, he unquestionably had *control.*

Point II

Proof Under Count One That a Counterfeit Plate Was "in the Likeness' of a Plate Designated for the Printing of "That Certain Ten-Dollar Federal Reserve Note (Serial Number, Series, and Check Letter Stated), Would Also Prove the Same Counterfeit Plate To Be "In the Similtude" of a Plate from Which Genuine Notes (of the Same Denomination, Series, Serial Number, and Check Letter) Have Been Printed (Count Two).

From the record it is clear that only *one* plate was involved in respondent's crime (R. 1; opinion of court below, R. 17). Proof that this plate was "in the likeness" of a plate designated for printing bills of a particular description, would certainly be adequate to prove that the *same* counterfeit plate was "in the similitude" of a plate from which *bills of the identical description* have been printed. Likeness and similitude are words of general description, and proof of similitude is sufficient if it is such as would deceive an ordinary, unsuspecting man. *Minella et al.* v. *United States*, 44 F. 2d 48 (C. C. A. 8).

Also, it may be noted: It is a matter of common knowledge that the currency of the United States conforms to an easily-recognized pattern that does not, and for obvious

reasons cannot suddenly change to the extent that some new series of ten-dollar Federal Reserve notes will no longer be recognizable as resembling the old. Such resemblance comes within the definition of similitude under this statute. *United States* v. *Raynor*, 302 U. S. 540; *Minnella et al.* v. *United States*, 44 F. 2d 48 (C. C. A. 8). It may be presumed, therefore, that any plate which has been *designated* for the printing of a certain class of notes is in substantial similarity to some plate which has been used for printing notes of the same description.

Finally, it would seem that this technical variance in the method of describing the genuine plates to which respondent's plate is likened, is not substantial enough to warrant an additional 15 year punishment on the ground that the two offenses are different. As Mr. Justice Rutledge states in his concurring opinion in *District of Columbia* v. *Buckley*, 128 F. 2d 17, 21 (U. S. C. A. D. C.):

> "The court must evaluate as well as spell out the difference, and determine whether the element it affects is sufficiently important in relation to other elements involved in both crimes to justify a refusal to apply the constitutional protection."

No. 793. UNITED STATES *v.* MICHENER. Certiorari, 329 U. S. 711, to the Circuit Court of Appeals for the

Eighth Circuit. Argued April 30, 1947. Decided June 2, 1947. *Per Curiam:* Reversed. *Blockburger* v. *United States*, 284 U. S. 299; *Albrecht* v. *United States*, 273 U. S. 1; *Gavieres* v. *United States*, 220 U. S. 338. MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE share the view of the Circuit Court of Appeals, 157 F. 2d 616, that this case is controlled by the principles announced in *Morgan* v. *United States*, 294 F. 82, 84; *Tritico* v. *United States*, 4 F. 2d 664, and *Goetz* v. *United States*, 39 F. 2d 903, and accordingly would affirm the judgment below. *W. Marvin Smith* argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington*, *Robert S. Erdahl* and *Irving S. Shapiro*. *Roger Kent* argued the cause and filed a brief for respondent. Reported below: 157 F. 2d 616.